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In the Supreme Court of the United States

OCTOBER TERM, 1948

COKE R. STEVENSON, *Petitioner*

VS.

LYNDON B. JOHNSON ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
SUPPORTING BRIEF

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No. _____

COKE R. STEVENSON, *Petitioner*

VS.

LYNDON B. JOHNSON ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Supreme Court of the United States:

Coke R. Stevenson, Petitioner, prays that writ of certiorari issue to review the final judgment and decision of the United States Court of Appeals for the Fifth Circuit entered on October 7, 1948, reversing the order of injunction issued by the United States District Court for the Northern District of Texas and remanding the case with direction to dismiss the complaint. (R., 209.)

OPINION BELOW

The opinion below appears in the Record (201-207) and a copy thereof is printed as an appendix to this petition.

STATEMENT OF THE MATTERS INVOLVED

Petitioner, as plaintiff below, appellee in the Court of Appeals, instituted this action by filing a complaint in the United States District Court for the Northern District of Texas on September 15, 1948 (R., 2-8).

The pleadings (the original complaint, R., 2-8; the amendment thereto, R., 10-15; and the trial amendment, R., 184) of petitioner Stevenson alleged, in substance, the candidacy of Stevenson and respondent Johnson for nomination by the Democratic party for the office of United States Senator from Texas; that nomination by the Democratic party is tantamount to election; that after the votes had been counted in one of the precincts in Jim Wells County and the results announced, the party officials fraudulently increased the count for respondent Johnson some 200; that, as so fraudulently increased, the vote in Jim Wells County was certified by local party officials to the State Democratic Executive Committee; that after the votes had been counted in Zapata County and the results announced, the party officials fraudulently increased the count for respondent Johnson and decreased the count for petitioner Stevenson; that as so fraudulently changed, the vote in Zapata County was certified by the local party officials to the State Democratic Executive Committee; that the canvass by the State Democratic Executive Committee gave effect to such fraudulent returns; that the returns from the various counties as canvassed by the State Democratic Executive Committee showed respondent Johnson received a majority of 87

votes over petitioner Stevenson; that the fraudulent increase in the count for respondent Johnson shown in the returns from Jim Wells and Zapata Counties was more than sufficient to account for the 87 vote majority shown by the canvass by the State Democratic Executive Committee; that except for such fraud the canvass by the State Democratic Executive Committee would have shown a majority for petitioner Stevenson; that the returns from Duval County showing 4,622 votes for respondent Johnson and 40 votes for petitioner Stevenson are fraudulent on their face; that the State Democratic Executive Committee in making its canvass of the returns from the various counties of the state acted as a canvassing board and had no power to conduct a contest or correct said fraudulent returns *(Ferguson vs. Huggins,* 122 Tex. 95, 52 S. W. (2d) 904); and that the laws of Texas do not provide a feasible or possible means of contesting a statewide primary election *(Sterling vs. Ferguson,* 122 Tex. 122, 53 S. W. (2d) 753). Such were in general the allegations of the pleadings of petitioner Stevenson.

The relief sought by petitioner Stevenson was, in substance, injunction against the certifying of respondent Johnson as the Democratic nominee for United States Senator from Texas; cancellation of the certificate of the Chairman and Secretary of the State Democratic Convention, if one had issued; injunction against the printing of respondent Johnson's name on the general election ballot; and for a declaration that petitioner Stevenson, in fact, had received the nomination. This latter part of the prayer was broad enough to warrant a declaration on

the allegations of fraud and of the rights of petitioner Stevenson and respondent Johnson.

The statement of facts (R., 73-140) brought up on the appeal discloses that the material allegations of the complaint and amendments were sustained by the testimony before the trial court. The findings of the trial court (R., 190-191) also sustain the essential allegations of the complaint.

The Election Board of Blanco County, Texas, intervened in opposition to petitioner's suit. (R., 47.)

H. L. Poole, A. G. Johnson and F. A. Harkrider, as voters who had voted for petitioner in the Democratic primary on August 28, 1948, intervened (R., 182-183), alleging that they had been deprived of their rights by illegal election returns made from Jim Wells County, as alleged in the original and amended complaints filed by petitioner, and adopted petitioner's pleadings.

The District Court, after hearing, granted a temporary injunction, pending determination of the action, restraining the certification to the election boards of the various counties of Texas the name of respondent Johnson as nominee of the Democratic party for Senator from Texas, and restraining the election boards from preparing and distributing official ballots for use in the general election to be held on November 2, 1948, carrying the name of respondent Johnson as the candidate of the Democratic party for the office of United States Senator from Texas. (R., 60-63.)

The action was brought under Title 8, Section 43, United States Code, 1946 (Title 8, Section 43, United States Code Annotated). Petitioner asserts that

jurisdiction in the District Court existed under Title 28, United States Code, Sections 1331 and 1343.

The injunction order granted by the District Court was reversed by the Court of Appeals for the Fifth Circuit and remanded with direction that the complaint be dismissed. (R., 209.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

The reasons relied on for allowance of the writ are stated below under the heading "Reasons Relied On."

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that Petitioner as a candidate for nomination by a political party for the office of United States Senator has no right secured to him by the Constitution of the United States within the provisions of Title 8, Section 43, United States Code, 1946.

2. Whether the Court of Appeals was correct in holding that Title 8, Section 43, United States Code, 1946, and Title 28, United States Code, Section 1343, do not authorize equitable relief to Petitioner under the allegations of the complaint and the testimony heard.

3. Whether the Court of Appeals was correct in holding this action as an election contest because the evidence heard and that to be taken by the Masters appointed by the trial court is of that character which is appropriate to an election contest.

4. Whether the Court of Appeals correctly ordered dismissal of the action.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

1. The holding of the Court of Appeals that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946, is an erroneous ruling on an important question arising under the Constitution and laws of the United States (*Constitution of the United States, Seventeenth Amendment; United States vs. Classic*, 313 U. S. 299); and this holding, together with the direction of the trial court to dismiss petitioner's complaint, has the effect to deprive petitioner of the right to claim damages by amendment to his complaint or in an independent action.

2. The holding of the Court of Appeals that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard, does not give appropriate effect to the provisions of Title 8, Section 43, United States Code, 1946, providing that a person who has been deprived of a right secured to him by the Constitution of the United States may have redress in an action at law, suit in equity or other proper proceeding.

3. The holding of the Court of Appeals is erroneous because it, in effect, denies to petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent Johnson. (Title 28, United

States Code, Sections 2201 and 2202, the *Declaratory Judgment Statutes; Mills vs. Board of Education*, 30 F. Supp. 245.)

4. The Court of Appeals erred in holding that the object of the action is that of a contest of an election because the evidence heard and that to be taken by the Masters appointed by the trial court is appropriate to such a contest.

5. The order of the Court of Appeals directing dismissal of the action is erroneous because it, in effect, denies to petitioner the right to amend his complaint and ask for the recovery of damages on the basis of facts there alleged.

WHEREFORE, petitioner respectfully prays that writ of certiorari issue to the Court of Appeals for the Fifth Circuit, to the end that the record in the appeal, styled *Lyndon B. Johnson, V. E. Streigler, Frank Shelley and C. H. Stevenson, Appellants, vs. Coke R. Stevenson, Appellee*, No. 12,529 on the docket of said Court of Appeals, may be brought before this Court for review and the judgment and decree of said Court of Appeals reversed, and particularly in so far as it directs dismissal of the action; and that Petitioner may have such other and further relief as may seem proper and just.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No._____

COKE R. STEVENSON, *Petitioner*

VS.

LYNDON B. JOHNSON ET AL, *Respondents*

BRIEF FOR PETITIONER

To the Supreme Court of the United States:

Petitioner respectfully submits this brief in support of his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not officially reported, but it is printed in the appendix and appears in the Record at pages 201-207.

JURISDICTION

The judgment and decree to be reviewed were rendered by the Court of Appeals on October 7, 1948. (R., 209.) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Petitioner claims rights under the Seventeenth Amendment to the Constitution of the United States and under Title 8, Section 43, United States Code, 1946; and construction of the Seventeenth Amendment, of Section 1, Title 2, United States Code, 1946; of clause 1, Section 4, Article 1 of the Constitution, and of Section 43, Title 8, United States Code, 1946, are necessary, in petitioner's view, to a proper determination of the case.

THE FACTS

Petitioner and respondent Johnson were candidates for the Democratic nomination for the office of United States Senator from Texas before the general primary election held in Texas on August 28, 1948. The State Democratic Executive Committee, upon canvassing the returns from the several counties in Texas, determined that such returns showed that Respondent Johnson received a majority of eighty-seven (87) votes. Petitioner Stevenson brought this action, alleging that fraudulent returns had been sent to the State Democratic Executive Committee from three Texas counties and that such fraudulent returns were sufficient to more than account for the majority vote accorded to respondent Johnson on the canvass made by the State Democratic Executive Committee. (R., 2-8, 10-15, 184.)

In his complaint, as amended, petitioner Stevenson prayed for injunctive relief restraining certification of the name of respondent Johnson as the nominee of the Democratic party for the office of United States Senator from Texas and for declaration that petitioner had received the nomination for said office. (R., 14-15.)

The allegations of the complaint charged fraudulent returns adverse to petitioner's interest; and the relief sought was broad enough to support a judgment declaring the existence or non-existence of fraud and the relative rights of petitioner and respondent Johnson.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946.

2. In holding that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard.

3. In denying to petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent Johnson.

4. In holding that the object of the action is that of a contest of an election.

5. In directing dismissal of the action because it, in effect, denies to petitioner the right to amend his

complaint and ask for the recovery of damages on the basis of facts there alleged.

POINT ONE

The Court of Appeals erred in holding that petitioner as a candidate does not have a right secured to him by the Constitution of the United States, within the meaning of Title 8, Section 43, United States Code, 1946.

AUTHORITIES AND ARGUMENT

The Seventeenth Amendment to the Constitution of the United States provides:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures."

The Congress has provided (Section 1, Title 2, United States Code, 1946) that:

> "At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by

> the people thereof for the term commencing on the 3rd day of January next thereafter."

Clause 1, Section 4, Article I of the Constitution provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

The section of the Constitution providing for the election of members of the House of Representatives (Clause 1, Section 2, Article I) controlled in *United States vs. Classic*, 313 U. S. 299, 310, and it provides as follows:

> * * * "'The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the Most numerous Branch of the State Legislature.'"

In the *Classic* case a question for decision was "Whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured by the Constitution' within the meaning of Sections 19 and 20 of the Criminal Code."

The charge was that the appellees had conspired to injure and oppress citizens in the exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States (313 U. S. 308), "namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast." The overt acts charged were the altering of ballots by the appellees, and falsely certifying the number of votes cast for the respective candidates. In the Supreme Court, the Government did not seek to sustain the application of the sections of the Criminal Code to the rights of the candidates. Hence that question is not discussed in the opinion.

On the right to choose a representative in Congress, the Court said (313 U. S. 310-311, 313-315):

> "Article I, Section 2 of the Constitution, commands that 'The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.' By Section 4 of the same article 'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.' **Such right as is secured**

by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by Section 2 and to the authority conferred on Congress by Section 4, to regulate the times, places and manner of holding elections for representatives.*

"We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter, and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining, first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellees' alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of Section 19 and to deprive inhabitants of the state of that right within the meaning of Section 20, and finally, whether Sections 19 and 20 respectively are in other respects applicable to the alleged acts of appellees.

"Pursuant to the authority given by Section 2 of Article I of the Constitution, and subject to the legislative power of Congress under Section 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other

*All emphasis herein is supplied.

states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections, and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, Sections 1 and 3.

* * *

"The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas vs. Trebucq, supra,* voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election.* In fact, as alleged in the indictment, the practical operation of the primary in Louisiana is, and has been since the primary election

* See *Westerman vs. Mims,* 111 Tex. 29, 227 S. W. 178; *Gilmore vs. Waples,* 108 Tex. 167, 188 S. W. 1037.

was established in 1900, to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.

"Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman* The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

"We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*,

* See *Smith vs. Allwright*, 321 U. S. 649.

110 U. S. 651; *United States vs. Mosley*, 238 U. S. 383. And see *Hague vs. C. I. O.*, 307 U. S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase 'rights' 'secured by the Constitution' appearing in Section 1 of the Civil Rights Act of 1871. 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see *Minor vs. Happersett*, 21 Wall. 162, 170; *United States vs. Reese*, 92 U. S. 214, 217-218; *McPherson vs. Blacker*, 146 U. S. 1, 38-39; *Breedlove vs. Suttles*, 302 U S.. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Section 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Section 4 and its more general power under Article I, Section 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' See *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough, supra*, 663, 664; *Swafford vs. Templeton*, 185 U. S. 487; *Wiley vs. Sinkler*, 179 U. S. 58, 64.

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. Ex parte Yarbrough, supra; Wiley vs. Sinkler, Supra; Swafford

vs. Templeton, supra; United States vs. Mosley, supra; see Ex parte Siebold, supra; In re Coy, 127 U. S. 731; Logan vs. United States, 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. Ex parte Yarbrough, supra; Logan vs. United States, supra."

Then in connection with the question as to whether the right to choose at a primary election a candidate for a party nomination for Congress is embraced in the right to choose Congressmen secured by Section 2 of Article I of the Constitution, the Court said (313 U. S. 318):

* * * "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

(In Texas, as in Louisiana, the primary is an integral part of the election procedure (*Smith vs. All-*

wright, 321 U. S. 649), and nomination by the Democratic party is, with rare exceptions, tantamount to election.)

The *Classic* case is authority for the propositions: (1) that where a primary election is a necessary step in the choice of candidates for representatives in Congress, the primary is an election within the meaning of the Constitutional provision and is subject to congressional regulation as to the manner of holding (313 U. S. 317); and (2) that the right of the voter in the primary is included within the term, "any right or privilege secured to him by the Constitution or Laws of the United States" as used in Title 18, Section 51, United States Code, 1946, and within the meaning of the term, "any rights, privileges, or immunities secured or protected by the Constitution and Laws of the United States," as used in Section 52, Title 18, United States Code, 1946 (313 U. S. 321-325).

In the opinion in the *Classic* case the Court indicated, if it did not hold, that Section 43 of Title 8, U.S.C.A., applies to primaries, for there the Court said (313 U. S. 323):

> * * * "It does not avail to attempt to distinguish the protection afforded by Section 1 of the Civil Rights Act of 1871, to the right to participate in primary as well as general elections secured to all citizens by the Constitution, see *Guinn vs. United States*, 238 U. S. 347; *Nixon vs. Herndon*, 273 U. S. 536; *Nixon vs. Condon*, 286 U. S. 73; *Lane vs. Wilson*, 307 U. S. 268, on the ground that in those cases the injured citiens were Negroes whose rights were clearly protected by the Fourteenth Amendment. At

> least since *Ex parte Yarbrough, supra*, and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, Sections 2 and 4 of the Constitution."

In *United States vs. Saylor*, 322 U. S. 385, the indictments charged a violation of Section 19 of the Criminal Code (18 U.S.C.A. 51) by defendants by inserting false ballots into the ballot box and returning them, together with lawful ballots, so as to create false and fictitious returns respecting the votes lawfully cast in an election for United States Senator. The question was whether the provisions of the statute covered a conspiracy by election officials to stuff a ballot box in an election at which a member of the Congress of the United States was to be elected. In the instant case there is a charge that votes were falsely added to the returns in one county and that in the other county votes were deducted from the count for petitioner Stevenson and that votes were falsely added to the vote for respondent Johnson.

This Court reversed the judgment of the trial court sustaining demurrers to the indictments, and after discussing *United States vs. Mosley*, 238 U. S. 383, said (322 U. S. 387-388):

> * * * "The conclusion was that Section 19 protected personal rights of citizens including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from

> the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."

It may be said with certainty that the *Classic* case and the *Saylor* case settle these points: (1) that the right of a voter to vote in a primary election at which a nomination is to be made of a candidate for Congress is a right secured to him by the Constitution and laws of the United States; (2) that falsely counting the votes or stuffing the ballot box deprives the voter of a right secured to him by the Constitution and laws of the United States; (3) that the right of which the voter is deprived by such conduct is a right within the meaning of the term "right or privilege secured to him by the Constitution and laws of the United States," as used in Section 51, Title 18, United States Code, 1946, and a right within the meaning of the term "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States," as used in Section 52 Title 18, United States Code, 1946.

The Seventeenth Amendment in providing that the "Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years," and that the "electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures" secures three rights: *first*, the right to each state to be represented in the United States by two Senators; *second*, the right of the people of each state who have the qualifications requisite for electors of the most numerous branch of the legislature of that

state to vote for candidates for United States Senator and to elect two persons to represent the state in the United States Senate; and *third*, the right of any inhabitant of the state who has been a citizen of the United States for nine years and has attained the age of thirty years to become a candidate for, and upon receiving the greater number of votes, to be chosen United States Senator.

If the third of these mentioned rights is not secured by the Seventeenth Amendment alone, it is secured by that provision of the Constitution, together with Clause 3, Section 3, Article I of the Constitution of the United States providing that:

> "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

There cannot be an election or any choosing of a United States Senator by election of the people unless two things concur. *First*, there must be electors to vote; and *second*, there must be candidates to vote for.

The Constitution imposes no limitations upon who may vote except that only those electors may vote who have "the qualifications requisite for electors of the most numerous branch of the State legislature." Congress has the power to alter the regulations enacted by states as to the times, places and manner of holding elections for Senators, "except as to the places of chusing Senators." Thus far, the only

actions taken by Congress on this subject are set forth in the provisions of Section 1, Title 2, United States Code, 1946, providing the time for election of United States Senators.

It is not conceivable that Congress could impose qualifications on one's right to be elected to the United States Senate in addition to those set forth in Clause 3, Section 3, Article I of the Constitution. At any event, Congress has made no such attempt nor has Texas. The right of any person who is not disqualified by that clause of the Constitution has the right under the Constitution to become a candidate for and be elected to the United States Senate from the state of which he is an inhabitant. The rights then are of the people who possess the requisite qualifications to become candidates for United States Senator and of the people who possess the requisite qualifications to vote for or against such candidates. Except these rights exist concurrently there can be no election in any state of a United States Senator. The right to become a candidate is just as much secured by the Constitution as the right to vote for or against candidates.

The Constitution that secures to the voter the right to vote for or against candidates for the United States Senate also secures to every citizen the right to become a candidate for the United States Senate provided he is not disqualified by the provisions of Clause 3, Section 3, Article I of the Constitution. The right of the candidate to have counted the votes cast for him is just as firmly secured by the Constitution as is the right of the voter to have his vote honestly counted. The right of the candidate that

the ballot box shall not fraudulently be stuffed against him is just as firmly secured by the Constitution as is the right of the voter that the effect of his vote shall not be destroyed by a stuffing of the ballot box.

When it is held that the citizens of Texas had the right in the primary election held on August 28, 1948, to vote for or against petitioner Stevenson and that this right was secured to them by the Constitution of the United States, it necessarily follows that it must be held that the constitutional provisions securing to the voters the right to vote, along with the other provisions of the Constitution with respect to the election of Senators, secured to petitioner Stevenson the right as a citizen to become a candidate, the right as a qualified voter to vote in the primary, and the right to have the votes honestly counted and returned by the election officials.

To say that the Constitution secures to the voter the right to vote for candidates for United States Senator and have his vote honestly counted, and that Section 43, Title 8, United States Code, 1946, gives a remedy for the deprivation of that right, but that the candidate does not have a right to an honest election and honest returns, and that the defeating of his candidacy by a dishonest count or stuffing of the ballot boxes is not a deprivation of a right secured to him by the Constitution and laws, is to render illogical and insupportable in reason the holding with respect to the right of the voters. If the answer comes back that the law does not secure to the voter the right to an honest count, the reply is that it was held in the *Classic* case that an indictment was valid

which had been drawn under Sections 51 and 52, Title 18, U.S.C.A., and charges that voters had been deprived of a right secured to them by the Constitution by the dishonest counting of the votes; and the language of Section 43, Title 8, United States Code, 1946, and the language of the two criminal statutes with respect to the rights protected thereby are substantially the same.

Every provision of law, constitutional or statutory, in this country, providing for an election of public officers contemplates an honest election, an honest count, honest returns, both as a right of the electors and as a right of the candidates. The very fact that a dishonest count of votes or dishonest returns by the election officials are prohibited by Sections 51 and 52, Title 18, United States Code, 1946, as a denial to the voters of their rights compels the conclusion that the same conduct would be a violation of those statutes as a denial to the candidate of a right secured to the candidate by the same law that secures to the voter the right to vote.

The Texas statutes provide, in substance, that the party County Executive Committee shall canvass the county election returns and certify the results thereof to the State Executive Committee; that the State Executive Committee shall canvass the returns from the several counties of the state and certify the results to the party State Convention; that the convention may approve or reject the report of the State Execuive Committee; and that the Chairman and Secretary of the State Convention shall certify to the Secretary of State the names of the party nom-

inees for state office. (Articles 3127, 3137 and 3138, *Vernon's Texas Civil Statutes.*)

Other statutes provide that the Secretary of State shall certify to county officers names of the various candidates for state office to be voted on in the general election; that the County Clerks of the several counties shall post the names of such candidates for ten days before ordering printed the general election ballots; and that absentee voting is permitted to begin twenty days before the day on which the election is to be held. (Articles 2925, 2956 and 3132, *Vernon's Texas Civil Statutes.)*

The Texas statutes set forth elaborate provisions with respect to the conducting of party primaries. In *Smith vs. Allwright*, 321 U. S. 649, 664-665, the Court spoke of these statutes as making "the action of the party the action of the state." They provide when the primary elections shall be held, where the voting shall be conducted, the officers who shall conduct the election, for the printing of ballots, what is necessary in order for a candidate to have his name printed on the ballot, for county executive committees, for the making of returns, for the canvassing of the returns, for state conventions, and for the certification of nominees. (Articles 3100-3153, *Vernon's Texas Civil Statutes.*)

The details of Texas law in respect to primary elections and of candidates securing the right to have their names printed on the general election ballot are comparable to those of the Louisiana law considered in *United States vs. Classic*, 313 U. S. 299, 311-314.

Title 8, Section 43, United States Code, 1946, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Primary election officials, the county party officers, the state party officers who have duties in connection with primary elections, and the Secretary of State and the county officers who have duties in connection with the general election, all act under state statutes. The primary election laws represent state action. What was done by the party officers in certifying the alleged fraudulent returns to the State Democratic Executive Committee was done "under color" of state law. In including the alleged fraudulent returns in its canvass, the State Democratic Executive Committee acted under a state law, and under one which, as construed by the Supreme Court of Texas in *Ferguson vs. Huggins*, 122 Tex. 95, 52 S. W. (2d) 904, withheld from the State Democratic Executive Committee the power to determine and cast out fraudulent returns.

In the broadest of terms Title 8, Section 43, United States Code, 1946, gives to any person "within the

jurisdiction" of the United States who has been deprived by another, acting under color of state law, "of any rights, privileges or immunities secured by the Constitution and laws" of the United States, the right to redress "in an action at law, suit in equity, or other proper proceeding for redress." The statute gives the cause of action. Another statute (Title 28, United States Code, Section 1342) confers jurisdiction of such causes of action on the District Courts.

The cause of action provided by Section 43 may be sued upon in the form of "an action at law" for damages for denial of the right to vote in a primary election, as in *Nixon vs. Herndon*, 273 U. S. 536, and *Smith vs. Allwright*, 321 U. S. 649; or equitable relief may be had in a "suit in equity." This latter provision of the statute evidences a legislative intent that the Congress did not intend that a person must wait until the deprivation has been accomplished, but intended to make available all equitable remedies, including injunction, to prevent the consummation of any threatened or attempted deprivation within the meaning of the statute.

The rights spoken of in these statutes are limited only by the provisions that they shall be rights secured by the Constitution and laws of the United States. They are not limited or qualified by the use of the term "civil rights," nor are they modified or enlarged by the use of the term "political rights." Cases are to be found in which the statement is made that the right to vote for public officers and the right of being elected to public office are political rights; that civil rights are those which have no relation to

the establishment or management of the government, but consist in the power of acquiring and owning property. Such expressions as these in the authorities are of no help here for the courts have recognized that the right to vote is a right within the term, "rights, privileges, or immunities secured by the Constitution." The statutes (Section 43, Title 8, United States Code, 1946) describe the rights for which redress may be had, and those rights are described as "any rights, privileges, or immunities secured by the Constitution and laws,"—"any rights" so secured. There is no limitation in the statute of the reach of the term "any rights," except the provision that they shall be rights secured by the Constitution. It may be assumed that the right to vote and the right to become a candidate are political rights; but as shown above, they are secured by the Constitution.

There is no need to pause to weigh the question as to whether the right to vote is a civil right or a political right. It is only necessary that it be a right in which the voter is protected by the Constitution or laws of the United States.

Section 43, Title 8, United States Code, 1946, does not mention either voters or candidates. It is directed against the deprivation of rights secured by the Constitution and laws of the United States. In applying this statute the attempt to set up a distinction between the right of a candidate and the right of an elector to an honest count of the votes and honest returns is necessarily arbitrary and unreasonable, because there is no support for it in the language of the statute. If the statute provides for redress to the voter for the deprivation of his right, it also affords

to the candidate the right to redress to prevent a dishonest count and dishonest returns, or redress from the wrong after it has been committed.

The Court of Appeals cited *United States vs. Gradwell*, 243 U. S. 476, 488, 489, and *United States vs. Bathgate*, 246 U. S. 220. It is respectfully submitted that these cases do not negative the proposition that the Constitution secures to a candidate for the office of United States Senator rights equal to those of the voters, or the proposition that a candidate by a dishonest count of votes or dishonest returns is deprived of a right in violation of Section 43, Title 8, United States Code, 1946.

In citing the *Gradwell* case, the Court of Appeals said it was there remarked that, "there is no applicable provision of the federal Constitution or statutes which secures the rights of a candidate for nomination." In view of the *Classic* case the remark cannot be accepted as a correct statement of the law.

The opinion in the *Gradwell* case involved the decision of four cases. Two of the indictments charged conspiracy to defraud the United States by corrupting and debauching, by bribery of voters at a general election at which representatives in Congress were voted for and elected in districts in Rhode Island. Another of the indictments related to the conduct of a primary election in West Virginia held under a law providing for a state-wide nomination of candidates for United States Senator. The charge was that the defendants had conspired to defraud the United States of its right to have candidates of the true choice and preference of the Republican and Democratic parties nominated, and one of them

elected, and that the defrauding was attempted by procuring persons to vote who were not qualified under the law and procuring others to vote more than once. The fourth indictment charged the defendants with conspiring to injure and oppress three candidates for the Republican nomination for United States Senator in a primary election held under West Virginia law by depriving them of the right and privilege of having each Republican voter vote only once, and of not having any votes counted except such as were cast by Republican voters duly qualified under West Virginia law. It was alleged that the defendants conspired to procure persons who were not qualified under state law to vote against the three and for another candidate.

The Court stated that the first three indictments above described were based solely upon the charge that the defendants had conspired to defraud the United States in violation of Section 37 of the Criminal Code (Title 18, Section 88, United States Code 1946), and that the fourth indictment was based upon the charge that three candidates were injured and oppressed within the meaning of Section 19 of the Criminal Code (Title 18, Section 51, United States Code, 1946). The Court considered the provisions of Section 37 of the Criminal Code prohibiting conspiracies to defraud the Government and held (243 U. S. 485) that it would be a strained and unreasonable construction to apply that section to elections. Then taking up the fourth indictment which charged the conspiracy to injure three of the candidates by procuring illegal voting for the fourth candidate in the primary, the Court considered Section

19 of the Criminal Code; and after describing certain features of the West Virginia primary election law, said (243 U. S. 488):

> "Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and **it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law and nothing of the kind can be found in any federal statute.** Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.
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> "What power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the

> Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia."

The effect of the holding was that the rights of the candidates for nomination are derived from state law and not from the Constitution and laws of the United States. For that reason, and aside from the doubt expressed in the opinion as to the applicability of Section 19 of the Criminal Code to primaries, the decision must be regarded as having become obsolete in view of the decision in the *Classic* case.

The opinion in *United States vs. Bathgate*, 246 U. S. 220, disposed of six cases. The indictments were in three counts. The first and second attempted to allege conspiracy in violation of Section 19 of the Criminal Code, and the third a conspiracy to defraud the United States contrary to Section 37 of the Criminal Code. It was charged that the defendants conspired to injure candidates for presidential electors, the United States Senate and representatives in Congress and "qualified electors who might properly vote thereat, in the free exercise and enjoyment of certain rights and privileges secured by Constitution and laws of the United States, namely—The right (a) of being a candidate, (b) that only those duly qualified should vote, (c) that the results should be determined by voters who had not been bribed and (d) that the election board should make a true and accurate count of votes legally cast by qualified electors and no others." It was alleged that the conspiracy

was carried into effect by purchasing votes and causing the election boards to receive them. The Court said (246 U. S. 224) that the real point involved "is whether Section 19 denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen." After discussing the repeal of parts of the Act of May 31, 1870, 16 Stat. 140, by the Act of February 8, 1894, 28 Stat. 36, which left in effect Section 19 of the Criminal Code, the Court held that "considering the policy of Congress not to interfere with elections within a state except by clear and specific provisions," and rules respecting the construction of criminal statutes, Section 19 was not intended to apply to conspiracies to bribe voters. The Court pointed out that bribery was denounced in another section of the original act and was not clearly within the words of Section 19, and reasoned that the repeal of the section of the original act applicable in terms to bribery strengthened the conclusion that Section 19 of the Criminal Code was not intended to govern bribery.

The *Bathgate* case can be disposed of by two statements: *first*, that it held that Section 19 of the Criminal Code does not reach bribery of voters; and, *second*, that the effect of the decision in that case has been weakened if it has not been totally destroyed by the decision in the *Classic* case in so far as the opinion in the *Bathgate* case may be construed to hold that a conspiracy to deprive voters of the right to an honest election (it will be noted that the Court stated in the opinion that the two counts drawn under Section

19 charged a conspiracy to injure "also qualified electors who might properly vote thereat") is not within the reach of Section 19 of the Criminal Code.

The Court of Appeals stated that in the *Bathgate* case a distinction was made between the personal right of the voter and the general right of a candidate to a pure final election, but this was not made the basis of the decision and it was not necessary to the decision of that case.

Even assuming that the right asserted by petitioner is a political right, nevertheless, a remedy for the deprivation thereof, or attempted deprivation thereof, is provided by Section 43, Title 8, United States Code, 1946. The terms of the statute are broad enough to include all rights, privileges and immunities, provided only they are secured by the Constitution and laws of the United States.

In the *Classic* case the Court, in speaking of the right of the people to choose representatives in Congress, said (313 U. S. 314):

> * * * "The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

It is evident from the quoted language that the Court meant that state statutes providing for the exercise of the right to vote, where the statues have

been enacted in conformity to the Constitution of the United States, are to be read in determining the scope of the rights secured by the Constitution. This obviously is correct, for if the prosecution had been for conspiracy to allow persons to vote who did not possess the qualifications of electors, it would have been necessary to look to state law to determine the requisite qualifications of an elector. It is the right of the people to choose in the manner provided by state action in conformity to the Constitution that is guaranteed or secured by the Constitution. The provisions of state law then with respect to the choice and who may vote and how a person may have his name printed on the ballot become an important subject for consideration in determining the right secured and protected by the Constitution.

Gilmore vs. Waples, 108 Tex. 167, 188 S. W. 1037, was an action by Gilmore to restrain the State Democratic Executive Committee from making a nomination of a candidate for State Railroad Commissioner, Gilmore having previously announced as a candidate for that office. A vacancy in the office had resulted from the death of the incumbent, and it was alleged that it was the purpose of the committee or convention to declare Hurdleston as the nominee of the party for that office. In that case the Court considered the question as to whether or not Gilmore's right to contest in the general election as a Democrat, without the disadvantage of an opposing Democratic nominee, was a mere political right where such nomination was not authorized by law. After stating that no appreciable conflict was believed to exist in the authorities upon the proposition that where the

making of a party nomination is once regulated by state law, the rights created and protected by the statute are legal—as distinguished from political—rights and that for their invasion, equity will afford its relief where there is no adequate legal remedy, the Court said (108 Tex. 176):

> "An essentially different status, however, is presented where the making of party nominations is governed by law. Rights arising under such laws, as is true in respect to all rights conferred by statute, are held to be legal rights, the exercise of which the courts will protect as a part of their duty to give effect to the written law of the land. And for the enforcement of such rights equity will not in proper cases deny its relief."

So, if the state law has been enacted in conformity with the Constitution and it is to be looked to in determining the scope of the right under the Constitution to choose representatives in the United States Congress or a United States Senator, then the Texas law, as construed by the court of last resort of the state, gives to the candidates a legal right which may be enforced by equitable remedies.

But, independent of state law, rights should be protected by equitable remedy under the provisions of Section 43, Title 8, even though such rights do not come strictly within the term "civil rights" as that term is defined to include those rights which have no relation to the establishment, support or management of the government. The right to vote for public officers and of being elected to public of-

fice are, in some of the early cases, said to be political rights. But it appears from the later cases that the right to vote is protected by Section 43; and if that is true, there seems to be no logical reason why the right to be elected to public office is not also protected by that statute. When the issue is reduced to the question as to whether Section 43 is intended to afford protection against the deprivation of political rights, the question is answered by determining whether or not the Constitution secures political rights, for the language of the statute is "any rights, privileges, or immunities secured by the Constitution." Certainly the Constitution does secure some political rights. Assuming that the right to vote for a candidate for Congress is a political right, it seems now settled that the right is secured by the Constitution and that it is protected by the Civil Rights Statutes.

In *Hague vs. C.I.O.*, 307 U. S. 496, the action was for injunction (307 U. S. 503) to restrain violations of what were claimed as constitutional rights of free speech and peaceable assembly. A city ordinance forbade the leasing of any hall, without a permit from the chief of police, for public meetings. An ordinance also forbade any person to distribute or cause to be distributed or strewn about any street or public place any newspaper, paper, circular, card or pamphlet. The plaintiffs in that case allege that they had been discriminated against by their being prohibited and interfered with in the distribution of leaflets and pamphlets while others were permitted to distribute similar printed matter. A question before the court was whether freedom to disseminate

information and to assemble peaceably for public discussion was a privilege or immunity secured by Section 1 of the Fourteenth Amendment and whether Section 1979 of the Revised Statutes (Section 43, Title 8, U.S.C.A.) afforded redress in a Federal Court for an abridgement of such right.

After quoting Section 1 of the Act of April 20, 1871, and stating that, as modified, it is now Section 43, Title 8, U.S.C.A., the Court said (307 U. S. 526-527):

> * * * "It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clause."
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> * * *
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> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by Section 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights."

The Court went on to hold (307 U. S. 529-530) that the suit could be maintained in Federal Court without allegation or proof that the constitutional immunity to be vindicated had a value in excess of three thousand dollars.

It cannot be said with any logic that a statute which gives the right to redress for the deprivation of "any rights, privileges, or immunities secured by the Constitution" protects an elector against deprivation of his right to vote and his right to an honest count of his vote, but does not give to a candidate for the United States Senate a right to redress for the deprivation or attempted deprivation of his right to an honest count of the votes cast and honest returns by the election officials.

POINT TWO

The Court of Appeals erred in holding that petitioner is not entitled to injunctive relief under the allegations of the complaint and the testimony heard.

POINT THREE

The Court of Appeals erred in denying petitioner the right to injunctive relief to preserve the status quo of the controversy pending declaration by the trial court of the rights of the parties as between petitioner and respondent.

AUTHORITIES AND ARGUMENT

(Points Two and Three)

After alleging fraud in the election returns, petitioner prayed for injunctive relief restraining certification to the Secretary of State of the name of

respondent Johnson as nominee of the Democratic party for United States Senator from Texas, for cancellation of the certificate if it had been issued, for injunctive relief restraining the Secretary of State from certifying to county officers the name of respondent Johnson as such nominee and restraining the county election boards from printing his name on the official general election ballot. Petitioner also prayed for declaration that he had received the nomination. (R., 8, 14.)

The declaratory judgments statutes (Title 28, U.S.C., Sections 2201 and 2202) were not specifically mentioned in the complaint. It does not appear that it was necessary to specifically mention them (Rule 8, Federal Rules of Civil Procedure) since they only provide an additional remedy for cases of which the Federal courts already have jurisdiction. The prayer for a declaration that petitioner received the nomination was certainly sufficient to justify judgment declaring the existence or non-existence of fraud in the returns and the respective rights of petitioner and respondent Johnson.

It seems evident that injunctive relief was proper to preserve the status quo pending determination of the rights of the parties. Traditionally it has been recognized that equitable relief may properly be granted to preserve the status quo.

If upon trial the evidence justified a judgment declaring that there had been fraud in the returns which had the effect to defeat what would otherwise have been the rights of petitioner, and such a judgment were entered by the court, it appears that petitioner would then have a remedy in the state courts

by mandamus to compel the placing of his name on the general election ballot. (Articles 1735, 1735a, 3142, *Vernon's Texas Civil Statutes.*)

It is true that in *Giles vs. Harris*, 189 U. S. 475, 486, this Court, in construing the words "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress," as they appeared in Section 1979 of the Revised Statutes (now Section 43, Title 8, United States Code, 1946), said:

> * * * "They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."

The case was a bill in equity brought by a colored man on behalf of himself and more than 5,000 other negroes of Montgomery County, Alabama, similarly situated, praying that the county board of registrars be required to enroll upon the voting lists the name of plaintiff and the names of all other qualified members of his race who applied for registration, and for judgment declaring contrary to the Fourteenth and Fifteenth Amendments certain provisions of the Alabama Constitution, which it was alleged, in substance, had the effect to prevent a large part of the negro population from voting. The plaintiff was in the position in that case of asking the court, at a time when Federal courts did not have power to enter declaratory judgments, to declare the provisions of a

state law unconstitutional and at the same time to enforce the registration provisions of the laws which plaintiff was asserting to be invalid. In *Lane vs. Wilson*, 307 U. S. 268, 272, Mr. Justice Frankfurter in discussing the *Giles* case, wrote for the Court:

> * * * "The plaintiff there was in effect asking for specific performance of his right under Alabama electoral legislation. This presupposed the valdity of the legislation under which he was claiming. But the whole theory of his bill was the invalidity of this legislation. Naturally enough, this court took his claim at its face value and found no legislation on the basis of which specific performance could be decreed."

The instant case is a different sort of case from *Giles vs. Harris*. A part of the ultimate relief sought is a finding by the court on the allegations of fraud and a declaration as a result of such finding.

Injunctive relief to preserve the status quo pending development of the facts and the entry of judgment is traditionally a part of the equitable jurisdiction of the Federal courts and resort to equity to protect their jurisdiction is not an uncommon practice.

POINT FOUR

The Court of Appeals erred in holding that the object of the action is that of a contest of an election.

AUTHORITIES AND ARGUMENT

In the trial of the case, for petitioner to prevail, it would as a matter of course be necessary to

establish by testimony the number of votes cast and counted in Jim Wells County, Texas, and in Zapata County, Texas; and that thereafter returns were fraudulently prepared to show that a greater number of votes were cast than had in truth been cast. But, the nature of the case cannot be determined from the testimony alone. The pleadings and the relief sought must also be considered. In the trial of *United States vs. Classic*, 313 U. S. 299, and in the trial of *United States vs. Saylor*, 322 U. S. 383, or in any prosecution under Section 51, Title 18, United States Code, 1946, where an allegation of fraudulently counting of votes or stuffing of ballot boxes is made, it would be necessary for the same character of proof to be introduced, but the case could not for that reason be properly classed as an election contest. An action brought by a voter for damages under Section 43, Title 8, United States Code, 1946, on allegations that his vote had been fraudulently counted could not properly be classed as an election contest because it would be necessary on the trial to go into the ballot boxes and determine how he had actually voted and consult the tally sheets to see how his vote had been counted.

In *United States vs. Saylor*, 322 U. S. 385, the court discussed *United States vs. Mosley*, 238 U. S. 383, and stated that the case affirms that the right of the elector protected by Section 19 of the Criminal Code is not only the right to cast his ballot, but to have it honestly counted, and concluded that a conspiracy which resulted in the stuffing of a ballot box, having the effect to falsify the count of votes legally cast, was within the prohibitions of Section 19.

Section 43, Title 8, United States Code, 1946, was obviously intended to give redress in a civil action for such wrongs as are defined by Section 19 of the Criminal Code (Section 51, Title 18, United States Code, 1946) to constitute a crime. If an action were brought by voters under Section 43, Title 8, for damages upon allegations that the effect of their votes had been destroyed by a stuffing of the ballot box, it would be necessary to prove their votes and that the effect thereof was destroyed by the illegal stuffing of the ballot box, but the character of the testimony would not justify classing the action as an election contest.

It follows that this case should not be classed as an election contest and for that reason jurisdiction denied.

POINT FIVE

The Court of Appeals erred in directing dismissal of the action because it, in effect, denies to petitioner the right to amend his complaint and ask for the recovery of damages on the basis of the facts there alleged.

AUTHORITIES AND ARGUMENT

The decree of the Circuit Court (R., 209) is that the order of injunction issued by the District Court be set aside; that the case be remanded "to the District Court with direction to dismiss the petition."

There is no provision that the dismissal shall be without prejudice to petitioner's right to maintain an action for damages under Section 43, Title 8, United States Code, 1946. Upon remand, it seems

obvious that petitioner would have a right to amend and ask for damages on the basis of the facts alleged in the complaint, and that the Court would have jurisdiction of the action.

WHEREFORE, petitioner respectfully submits that the opinion and judgment of the Court of Appeals are erroneous; that the case presents important questions pertaining to the construction of the Constitution of the United States and the Acts of Congress; that certain of the questions have not been determined by this Court; and that the petition for writ of certiorari should be granted.

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Copies of the Petition and Brief have been sent to each of the Attorneys for Respondent.

APPENDIX

(Before HUTCHESON, SIBLEY, and McCORD, Circuit Judges.)

SIBLEY, Circuit Judge: On September 15, 1948, Appellee Stevenson filed this suit in the district court against Appellant Johnson and others to stop by injunction the certifying by the officers of the Democratic Party in Texas of the name of Johnson as the nominee of that party for United States Senator as a result of a Democratic primary election; to prevent his name as such being placed on the official ballots for the general election to be held November 2, 1948; and for a cancellation of such certification if made; and a declaration that Stevenson is the true nominee. The other defendants are the party officers who are charged with the duty of certifying; the Secretary of State to whom the certificate is addressed and who prepares the form of ballot; and the members of the election board of Tarrant County, who are alleged to be proper representatives of all the board members in the 253 other counties of the State who are too numerous to be brought before the Court. A restraining order was at once granted and a hearing set for a temporary injunction. At the hearing Johnson filed a motion to dismiss on various grounds, including these: that the relief sought is in essence a contest of the primary election and the Court has no jurisdiction to hear and determine such election contest; that the Court has no jurisdiction to determine the right and title to the Democratic nomination for United States Senator, and that such jurisdiction is expressly denied by 28 U. S. C., Sec. 1344; that no deprivation of a right or privilege secured by the Constitution or

laws of the United States is alleged, but only of a right to a party nomination under the election laws of the State of Texas, as to which there is no jurisdiction in the federal district court; and that there is no jurisdiction in equity to nullify a certificate of nomination duly made under the laws of Texas in favor of Johnson, who is a person qualified to hold the office, in order to substitute another as nominee. Johnson also filed under oath what he calls an opposition to the temporary injunction which takes issue with some of the factual allegations of the petition and proposes at a proper time and in a proper forum to show illegal votes in larger numbers which were counted for Stevenson than those Stevenson claims were fraudulently counted for Johnson. The other defendants filed motions to dismiss as to them and answers, but none of these has any real interest in the result or is charged with any personal misconduct, and they need not be further noticed. The motions to dismiss were overruled. Evidence was introduced by both Stevenson and Johnson tending to support their contentions of fact. The Court made no specific findings of fact, but held generally that the facts were with the plaintiff and granted a temporary injunction on September 22, 1948, "for the reason that there was evidence of fraud in the official returns from certain election officials in Jim Wells, Zapata, and possibly other counties, to the State Democratic Executive Committee, without which there would have been a change in the official certification by the officers of the State Convention as to who was the Democratic nominee for the office of United States Senator." The injunc-

tion forbids the certifying and reporting to the election boards of all the counties that Johnson is the Democratic nominee, and forbids the boards to prepare and distribute ballots carrying Johnson's name for use in the election. The appeal is from the grant of this temporary injunction.

We are of opinion that whatever may be the truth as to the fraudulent returns from certain precincts in the named counties, and whatever may be the truth as to illegal votes elsewhere which are claimed as more than an offset, the subject matter is not one to be taken cognizance of by the district court for the exercise of equitable relief. The object to be attained is precisely that of a contest of an election, the evidence so far heard is all appropriate to such a contest, as is that proposed to be taken by one or more masters which the record shows are to be appointed to go to all the counties in which illegal returns or voting has been or may by amendment be alleged to have occurred. The Texas Statutes afford machinery for such a contest as part of their provision for both party nominations and final elections. It is urged that there is not time to review a statewide primary by such a contest before the general election comes on. But if there were no provision at all for contesting the result of a primary it would not give a district court jurisdiction which it lacks. The Constitution, Art. I, Sec. 5, after all makes each House of Congress the final judge of the qualifications, elections, and returns of their respective members; and if a State, as Texas has done, makes nominations by a primary to be a part of its election machinery, and if, as is alleged here, Democratic nomi-

nation insures election, no reason occurs to us why this constitutionally provided judgment of the election should not reach back to the nomination; and we judicially know that such Congressional investigations have included primaries.

The jurisdiction of the district court is limited to those cases within Art. III, Sec. 2 of the Constitution over which an Act of Congress has given it jurisdiction. The petition refers us to Sec. 1343 of Title 28 of the United States Code as recently revised and enacted, entitled "Civil Rights," and to Sec. 43 of Title 8 of the Code in the chapter on Civil Rights entitled "Civil Action for Deprivation of Rights." Both sections use equivalent language, that of Sec. 43 being: "Every person who under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The redress here chosen is a suit in equity. The right claimed is the Democratic nomination as United States Senator in a primary held under the laws of Texas, which is alleged to be a right of property exceeding $3,000 in value because Democratic nomination insures final election and the emoluments of the office far exceed that sum or value. We may assume without deciding that this nomination is the equivalent of election and that the right to the election is really in controversy. We then face Sec. 1344 of Title 28 entitled

"Election Disputes," which does give the district court jurisdiction over such disputes if the sole question arises out of the denial of the right to vote on account of race, color or previous condition of servitude, and limits the jurisdiction to the determination of the right to vote. No such question is raised in this case; but if it were, the section expressly excludes disputes concerning the office of "elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a State legislature." This is a dispute about the office of United States Senator. In this section there is a manifest purpose to keep the judicial department from intervening, even by the usually available law writ of *quo warranto*, in the election of these high functionaries in the executive and legislative departments. According to the common law there was no right at all to contest in a court any public election, because they belong to the political branch of the government and are beyond the control of judicial power, and the only remedy in the nature of an election contest was a *quo warranto* or an information in that nature. 29 C.J.S., Elections, Sec. 246. This explains the words in Sec. 1344 "to recover possession of any office," which would be the object of a *quo warranto*. The aim of the section is to enable the district court to interfere in elections only to the limited extent it prescribes and to exclude it altogether from interfering with the election of a Senator or with the constitutional right of the Senate to judge of his election in all its steps or stages.

But if Sec. 1344 has no application because a party nomination is not an office, and if Sec. 1343 is to be applied, we get no further. Its words, as set forth in Sec. 43 of Title 8, were before the Supreme Court in *Giles v. Harris*, 189 U. S. 475, which was a case concerning the right of Negroes to register for voting in Alabama, which was brought by the excluded voters themselves. Their standing to complain under this statute had just previously been established, as it has been recently confirmed by *Smith v. Alwright*, 321 U. S. 649,, in the Supreme Court, and by *Chapman v. King*, 154 F. (2d) 460, in this Court. But Justice Holmes for the Court said, p. 486: "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of Sec. 1979 (now Section 43 of Title 8) does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief . . . The words allow a suit in equity only when it is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. Green v. Mills, 69 Fed. 853, 30 L. R. A. 90." To *Green vs. Mills* may be added a host of authorities. 18 Am. Jur., Elections, Sec. 272; 30 C.J.S., Equity, Sec. 66 and cases cited. *Blackman v. Stone*, 17 F. Supp. 102, by three judges, contains a review of the federal cases. *Turman v. Duckworth*, 68 F. Supp. 744, is also a recent case by three judges. Ap-

peals in both cases were dismissed in the Supreme Court.

But Stevenson does not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it. He is here claiming a political nomination by a primary under the laws of Texas. As was remarked in *United States v. Gradwell*, 243 U. S. 476, 488, 489, in applying the similar provisions of the Criminal Statute then Sec. 19 of the Criminal Code (now Sec. 241 of Title 18) to a nominating primary, there is no applicable provision of the federal Constitution or statutes which secures the rights of a candidate for nomination; and the distinction between the personal right of the voter and the general right of a candidate to a pure final election was made in *United States v. Bathgate*, 246 U. S. 220, 226, 227. We have found no case holding that one claiming a nomination in a primary held under state law, though it be a part of the state election machinery, has any right secured by the laws of the United States. We have here no question of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law. The persons alleged to have perpetrated the frauds are not even parties. We are of opinion, both on the words of Sec. 1343 of Title 28 and under the broad policy indicated in Sec. 1344, that there is here no case for interference by a federal court of equity in a senatorial primary; that the injunction ought not to have been granted; and that the motion to dismiss

ought now to be sustained. We can order dismissal on this interlocutory appeal. *Smith v. Vulcan Iron Works*, 165 U. S. 518, and cases following it.

The order of injunction is set aside and the cause is remanded with direction to dismiss the petition.

REVERSED WITH DIRECTION.

Office - Supreme Court,
JAN 5 1949
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No. 466

IN THE

Supreme Court of the United States

COKE R. STEVENSON, *Petitioner,*

v.

LYNDON B. JOHNSON, ET AL., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully submit this brief in opposition to the petition for writ of certiorari and in reply to the brief for petitioner.

Statement of the Case.

The case is fairly stated in the opinion of the Court of Appeals, and that statement is adopted with the following additions (R. 45-50). None of the election officials who are alleged to have committed or participated in the alleged fraud were parties to the suit. There are no allegations that Johnson or the other respondents were parties to, participated in, or were cognizant of any fraud, as alleged. There are no allegations of conspiracy (See Complaint, R. 1, and Amended Complaint, R. 7).

Reasons for Denying the Petition.

The petition should be denied and writ of certiorari refused for the following reasons:

1. The questions presented are moot. They call on this Court for an opinion on abstract propositions only.

2. The case was correctly decided by the Court of Appeals.

3. Petitioner is not entitled to have the cause remanded in order to amend in an attempt to state a cause of action for damages.

ARGUMENT.

Point One.

The Questions Presented Are Moot. They Call on This Court for an Opinion on Abstract Propositions Only.

Authorities and Argument.

The General Election was held in Texas on November 2, 1948, under the provisions of Federal law[1] and the provisions of the statutes of Texas.[2] The time for canvassing the vote, making returns of the election and issuance of certificate of the election has expired.[3] Respondent Lyndon B. Johnson was duly elected. The issues raised in the present case relate solely to the primary election. Not only is that election completed, but the general election has been held and completed. Accordingly, this case presents no issues which can or should be subject to the processes of equity. It is the province of the Court to decide real controversies, not to discuss or give opinions on abstract propositions.[4]

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[1] U. S. C., Title 2, Section 7.

[2] R. S. of Texas, 1925, Articles 2930, as amended, and 3086.

[3] R. S. of Texas, 1925, Articles 3026-3035.

[4] Ashwander v. Tennessee Valley Authority, 297 U. S. 288; Barker Painting Co. v. Local 734, B. P. D. P., 281 U. S. 462; George Moore Ice Cream Co. v. Rose, 289 U. S. 373; 14 Am. Jur. (Courts), Section 49, Page 277.

None of the relief sought by petitioner would be effective if the judgment of the Court of Appeals is set aside. The relief sought upon trial on the merits was that plaintiff have judgment (1) permanently enjoining the issuance of a certificate of nomination of Johnson, and if one had been issued, then cancelling and annulling such certification so made; (2) that the defendant Brown, Secretary of State, and all other defendants named as election officials be permanently enjoined from preparing any official ballot for use in the General Election on November 2, 1948, carrying the name of the defendant Lyndon B. Johnson as the nominee of the Democratic Party of Texas for the office of United States Senator from the State of Texas; and (3) for judgment declaring plaintiff received the nomination of the Democratic Party of Texas for United States Senator.

It is obvious that the only effective relief which the Court could have granted to petitioner, if the Court had jurisdiction and authority to grant any relief, would have been to prevent the name of Johnson from being printed on the official ballot at the General Election to be held on November 2, 1948. It is remotely possible—although we deny it—that the Court might have had power also to declare petitioner to be the Democratic nominee and require that his name appear on the official ballot as such nominee. While it may be argued that nomination by the Democratic Party is equivalent to election, such argument is premised on the name of the nominee appearing on the official ballot. Election is determined by votes cast in the General Election, and it cannot with any show of reason be argued that a nominee whose name is not printed on the official ballot is assured of election.

Point Two.

The Case Was Correctly Decided by the Court of Appeals.

Authorities and Argument.

District Courts of the United States have no jurisdiction over election contests.

The jurisdiction of the district courts is limited to those cases within Article III, Section 2 of the Constitution over which an Act of Congress has given them jurisdiction. The only Act of Congress which it may be argued confers jurisdiction on United States District Courts over an election contest appears as Section 1344, Title 28, U. S. C. (revised), headnoted "*Election disputes.*" This section confers jurisdiction on the district courts "of any civil action to recover possession of any office" and specifically exempts the office of United States Senator. By a "civil action to recover possession of any office" it was evidently the intent of Congress to limit the action to a *quo warranto* proceeding, which is the only proceeding, absent statutory authority, for testing the right to public office. Courts of general jurisdiction have no power, either in law or equity, to try election contests unless expressly authorized to do so by constitutional or statutory provisions.[5]

The fact that Congress found it necessary to enact Section 1344 of Title 28, U. S. C. (revised) in order to confer jurisdiction on the District Courts over the limited type of election disputes therein enumerated conclusively establishes that it did not intend that other and general statutes should have the effect of conferring jurisdiction on the District Courts of all election disputes involving alleged denial

[5] 29 C. J. S. pp. 355-358, Sec. 247, 18 Am. Jur. pp. 359-60, Sec. 272. The reason for the rule is that courts have universally recognized that the conduct of elections constitutes an exercise of a political function of the Government to which judicial authority does not extend unless specially conferred.

of any and all rights guaranteed the citizens by the Constitution and laws of the United States.

If it be conceded that the Congress has the power under Article I, Section 4, and Article III, Section 2 of the Constitution to confer jurisdiction on the District Courts to hear and determine election contests, the question recurs, whether Congress has exercised that power. The history of congressional legislation on the subject has been reviewed fully by this Court in *United States* v. *Gradwell,* 243 U. S. 476, wherein it is demonstrated that Congress did provide for the regulation and supervision of elections in the Enforcement Acts of 1870 and 1871, which were repealed in 1893, the basis of the repeal being the report of a Congressional Committee that such matters were better left to the states. Petitioner, in effect, concedes that the District Court has no jurisdiction over election contests, by resorting to a labored argument that this is not an election contest.

The Court of Appeals correctly decided that the suit was essentially and in fact an election contest. Petitioner argues that this is not an election contest because the character of proof necessary to the granting of the relief sought would also be appropriate in the trial of a criminal case.[6] Such argument is begging the question. In order to sustain a criminal prosecution, it would only be necessary to show that one fraudulent vote was cast or counted; or, in a proper case, to show that there was a conspiracy to make fraudulent returns or to bribe voters. In order for a court to give petitioner the only effective relief sought here, it would be necessary for the Court to ascertain first whether there were fraudulent votes cast and returned, and, if so, whether they had the effect of changing the result. It would be appropriate for the defendant in such action to show, as respondents proposed to show, and in fact did show, that there were more illegal votes cast, counted and

[6] Citing U. S. v. Classic, 313 U. S. 299, and U. S. v. Saylor, 322 U. S. 385.

returned for petitioner than those alleged to have been returned for respondent Johnson.[7]

Evidence of illegal votes in certain boxes did not entitle petitioner to the relief sought unless all of the evidence showed that but for such votes the result would have been different. If the face of the returns had showed a majority of 100,000 votes for Johnson, certainly it could not be said that because 308 votes counted for him were fraudulently returned, petitioner would be entitled to the relief he sought.

The relief sought is exactly the relief sought in an election contest, and the type of relief that can be granted only in an election contest. Likewise, the evidence necessary to determine whether petitioner was entitled to the relief sought is exactly the evidence necessary to the determination of an election contest. The necessary evidence means all legally admissible evidence tendered by both parties in respect to illegal voting, and this would be admissible and appropriate in no other action than an election contest.

The Constitution and laws of the United States deny to District Courts jurisdiction of a suit involving the title to the office of United States Senator. Article I, Section 5 of the Constitution specifically provides that "each House shall be the judge of the Elections, Returns, and Qualifications of its own members . . ." It is evident that the Con-

[7] By his pleadings, Johnson alleged that he was prepared to show and would show at a proper time and in a proper forum that more illegal votes were cast, counted and returned for petitioner than those alleged to have been so returned for respondent Johnson (R. 36-37). The statement appearing in the petition (p. 4) that the "statement of facts brought up on the appeal discloses that the material allegations of the complaint and amendments were sustained by the testimony before the trial court" is not true. Petitioner alleged that there were 308 votes illegally returned for respondent Johnson in two counties. The evidence to sustain such allegations was slight, if indeed it were admissible or of any probate force in a trial on the merits. Respondents introduced evidence to show that a trial before a court of competent jurisdiction in a contest for a local office resulted in a judicial ascertainment that 1736 illegal votes had been cast in one county, out of which petitioner Stevenson had received 468 votes more than respondent Johnson.

gress considered this provision of the Constitution as conferring exclusive jurisdiction on its two Houses and for that reason denied District Courts jurisdiction of actions involving the office of United States Senator and Representative in or delegate to Congress.

The brief for Petitioner grounds his right on the Seventeenth Amendment to the Constitution, providing for the election of Senators, and on Article I, Section 4 of the Constitution, providing that the times, places and manner of holding elections for Senators shall be prescribed in each state by the legislature thereof but that the Congress may at any time by law make or alter such regulations, and on Section 1 of Title 2, United States Code, 1946, providing that a United States Senator shall be elected by the people of the State. In the complaint it is alleged that "the rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas for a term of six years, beginning in January, 1949, and which nomination amounts to election to the office of United States Senator from Texas for said term."

Petitioner is in the unenviable position where he must blow hot and blow cold. As a basis for his claimed right, he relies on the provisions of the Constitution and laws of the United States providing for the election of United States Senators by vote of the people. To bring himself within the provisions of those sections of the Constitution and statutes, he must argue that the contest involves an election. But when confronted with the fundamental principle that courts are without jurisdiction to determine election contests unless clothed therewith by statutory or constitutional provisions and when confronted with the provisions of Article I, Section 5 of the Constitution and Section 1344 of Title 28 of the Code, which specifically deny jurisdiction to the Federal Courts, petitioner must take the opposite position and contend that the controversy is not over an election but over a Party nomination.

Petitioner has wholly failed to allege any facts sufficient to state a cause of action within the jurisdiction of the District Court. Petitioner relies, as he must, on Title 28, Section 1343, U. S. C., the pertinent parts of which are:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"
>
> * * * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

It will be noted that jurisdiction is conferred on the District Courts only of a "civil action authorized by law." Petitioner then points to the only law which can be found to authorize any such action, being Title 8, Section 43, U. S. C., reading:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It will be noted that petitioner does not sue the "person" who allegedly subjected the party injured to the deprivation of any rights allegedly secured by the Constitution and laws.

Petitioner then proceeds to claim that the "rights, privileges, or immunities secured by the Constitution and laws," of which he is alleged to have been deprived, were secured to him by the Seventeenth Amendment to the Constitution

and Article I, Section 4 of the Constitution. These provisions of the Constitution and all relevant statutes that we have been able to find simply secure to the qualified electors the right to choose their United States Senator by popular vote. None of them attempts to deal with the right of any citizen to become the candidate of a political party for the office of United States Senator, nor to prescribe how such political party shall select its candidates. The cases so strongly relied upon by petitioner[8] each dealt with the right of the people "to choose a representative in Congress" (Petitioner's brief, p. 14). This Court, in the *Gradwell case, supra,* unanimously rejected the contention that the provisions of the Constitution and statutes relied upon by petitioner conferred any rights on a candidate for office. In that case a primary election was involved. In the later case of *U. S.* v. *Bathgate,* 246 U. S. 220, such contention respecting a General Election was again rejected. This Court did not consider the right of the candidate in the *Classic case,* although such question was considered by the lower court in dismissing the indictment. In its jurisdictional statement to this Court, the Government said:

> "It was alleged that these defendants conspired to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, i. e., (1) the right of registered voters who cast their ballots at this primary election to vote and to have their votes counted as cast for the candidate of their choice, and (2) the right of certain candidates at this primary election to have all votes cast for them counted as cast. The Government in this case is not seeking to sustain the application of Sections 51 and 52 [i.e. Sections 251 and 252, Title 18, United States Code] to the rights of candidates at primary elections. Consequently it is not challenging the ruling of the District Court [sustaining demurrer to the indictment] insofar as it applies to the second object of the conspiracy . . ."

[8] U. S. v. Classic, 313 U. S. 299, U. S. v. Saylor, 322 U. S. 385, and U. S. v. Mosley, 238 U. S. 383.

Thus, the principles enunciated in the *Gradwell* and *Bathgate* cases as establishing the rights of a candidate for office were in no manner overruled or modified by the decision in the *Classic* case. That principle was adhered to by this Court, in effect, by denying certiorari (328 U. S. 870) in *Saunders* v. *Wilkins*, 152 F. (2) 235.

It is true that this Court was then considering sections of the Criminal Code (Title 18, Sections 251 and 252, U. S. C.), but the rights there protected are no different from those protected by the provisions of Section 43 of Title 8 of the Code.[9]

Petitioner's cause, therefore, must fail on both grounds—first, that the Code gives him a cause of action only against the person who deprived him of his right and did him the injury, and, second, because the right asserted is not one guaranteed to *him* under the Constitution and laws of the United States.

If petitioner's argument be followed to its logical conclusion and if petitioner be sustained in his contentions, the United States District Courts could be called upon to exercise their equitable powers in behalf of any candidate in any election, general or primary, for any office, from Constable to United States Senator. It would only be necessary for a defeated candidate to allege that votes had been fraudulently counted so as to deprive voters of rights guaranteed under the Fifteenth Amendment to the Constitution. Federal courts would be continually called upon to use their equitable powers "to achieve or frustrate a political result." This Court, speaking through Mr. Justice Holmes, refused to be drawn into such a situation when it said: "The traditional limits of a proceeding in equity have not embraced a remedy for political wrongs."[10]

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[9] Hague v. Congress of Industrial Organizations, 307 U. S. 496, Burt v. City of New York, 156 F. (2) 791, Picking v. Pa. R. Co., 151 F. (2) 240.

[10] Giles v. Harris, 189 U. S. 475. See also Lane v. Wilson, 307 U. S. 268, Anthony v. Burrow, 129 Fed. 783, Turman v. Duckworth, 68 F. Supp. 744, and Blackman v. Stone, 17 F. Supp. 102.

Point Three.

Petition is Not Entitled to Have the Cause remanded in Order to Amend in an Attempt to State a Cause of Action for Damages.

Authorities and Argument.

titioner refers to no authority, rule or precedent entitling him to a remand of a cause where no cause of action is alleged in the complaint. The Court of Appeals properly ordered dismissal under authority of the case cited in its opinion[11] and the many other cases of like effect decided by this Court. Petitioner contents himself by stating that "it seems obvious that petitioner would have a right to amend and ask for damages on the basis of the facts alleged in the complaint" (petitioner's brief, page 47).

The facts alleged in the complaint are wholly insufficient to state a cause for damages. Petitioner now asserts that he has a right to maintain an action for damages under Section 43, Title 8, U. S. C. As heretofore pointed out, this statute provides only for redress against the person who "subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." If it be assumed that petitioner, as a candidate for office, was deprived of any such rights, nevertheless, his cause of action would be against the persons who were guilty of depriving him thereof. There is no allegation in the petition that any of the defendants named therein were guilty of depriving petitioner of any of his rights. It is alleged that fraud was committed in Jim Wells and Zapata Counties. The election officials in those counties who could have committed any of the overt acts alleged are not patries to the cause of action. It is not alleged that any of the other parties to the suit, including respondent Johnson, had any knowledge

[11] Smith v. Vulcan Iron Works, 165 U. S. 518.

of the alleged fraud, and no conspiracy is alleged. Only the defendant Tom L. Tyson, Chairman of the State Democratic Convention (who resides in Navarro County, Texas) and the defendants composing the Election Board of Tarrant County are residents within the territorial jurisdiction of the District Court for the Northern District of Texas, where the case was filed. Tyson did not take office until after the alleged fraud occurred, and both he and the Tarrant County Election Board performed only ministerial duties. Jim Wells and Zapata Counties, where the election officials reside, are in the territorial jurisdiction of the District Court for the Southern District of Texas, and the other defendants are alleged to reside within the territorial jurisdiction of the District Court for the Western District of Texas.

CONCLUSION.

From the foregoing, it is obvious that petitioner's only object in asking for certiorari and the only purpose which he hopes to gain thereby is to have this Court render an advisory opinion on an abstract question, namely, whether petitioner, as a candidate for the Democratic nomination for United States Senator from Texas, had rights, as such, which are guaranteed to him under the Constitution and laws of the United States, for deprivation of which he could maintain a suit for damages under the provisions of Section 43, Title 8, of the U. S. Code. This Court would be

proceeding contrary to all precedent if it granted certiorari on the issues presented in the petition.

WHEREFORE, respondents respectfully submit that the petition for certiorari should be denied.

JOHN H. CROOKER,
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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1948

MOTION NO. 466

COKE R. STEVENSON,
Movant,

VS.

LYNDON B. JOHNSON ET AL,
Respondents

MOTION TO VACATE STAY ORDER AND DISMISS THE PROCEEDINGS,

and

MEMORANDUM OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1948

MOTION NO._____

COKE R. STEVENSON,
Movant,

VS.

LYNDON B. JOHNSON ET AL,
Respondents

MOTION TO VACATE STAY ORDER AND DISMISS THE PROCEEDINGS,

To the Supreme Court of the United States:

Coke R. Stevenson, moving for an order of the Court vacating the stay order made by Associate Justice Black on September 28, 1948, on the motion of Lyndon B. Johnson, V. F. Striegler, Frank Shelley and C. H. Stevenson, the latter three as the Election Board of Blanco County, Texas, and as representatives of other such boards, petitioners, (against whom complaint is made) versus Coke R. Stevenson, respondent, shows:

I.

On September 28, 1948, Associate Justice Black, as an Associate Justice of the Supreme Court of the United States, made an order on the motion of Lyndon B. Johnson and others, petitioners, (herein for convenience referred to as petitioners) against Coke R. Stevenson, respondent (herein for convenience referred to as respondent), staying a temporary injunction issued by the United States District Court for the Northern District of Texas, Fort Worth Division, on September 23, 1948, in an action entitled *Coke R. Stevenson vs. Lyndon B. Johnson et al*, Civil No. 1640, in substance, restraining, pending trial of said action on its merits, the Secretary of State of the State of Texas from certifying to the election officials of the State of Texas, and the election boards of the several counties of Texas from printing on the official election ballot for use in the general election to be held in Texas on November 2, 1948, the name of Lyndon B. Johnson as the nominee of the Democratic Party for the office of United States Senator from Texas.

An appeal has been taken to the United States Court of Appeals for the Fifth Circuit from the order of the District Court granting said temporary injunction, the record has been filed in said United States Court of Appeals, and the appeal has been set by agreement of the parties for submission and oral argument before the United States Court of Appeals in Atlanta, Georgia, on Monday, October 4, 1948.

II.

The stay order so made should be vacated and the motion of petitioners dismissed for the following reasons:

(1) The motion of petitioners on which said stay order was made, recites that it is for "a stay of a temporary injunction" and "for a stay of other proceedings in the said District Court," and therein petitioners pray for an order "staying the temporary injunction issued by the Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, and staying all further proceedings in that court in this case until further order of the Supreme Court"; and, properly construed, said motion is a petition to an Associate Justice of this Court for a writ of prohibition. So construed, the motion does not warrant the order made and the order was erroneously and improvidently made, because

(a) The motion of petitioners was not one upon which a Justice of this Court had jurisdiction or power to act, because under the practice in this Court, as respondent understands, the filing of a motion or petition to prohibit further proceedings in a lower court is not a matter of right, and leave to file is granted only by action of the Court

upon motion, with notice to the opposite party to show cause before the Court why writ of prohibition should not issue; writ of prohibition restraining further proceedings in a lower Court is a matter for the discretion of this Court; such a writ will be granted only to protect or preserve the jurisdiction of this Court; it cannot be granted by a Justice of the Court, but only by the Court.

(b) In such a proceeding the Judge or Judges of the lower Court are indispensable parties, but neither of the Judges of the Court of Appeals in which the appeal is pending nor the Judge of the District Court is made a party to petitioners' motion.

(c) The complaint and the amendment thereto, filed in the District Court, copies of which are attached to petitioners' motion and identified as Exhibits A and B (to which reference is made for a full statement of the allegations thereof and of the nature of the action) state a claim within the jurisdiction of District Courts of the United States.

(2) If petitioners' motion is treated as only a motion to stay the temporary injunction granted by the District Court after hearing, the stay order was erroneously and improvidently made, because

(a) The jurisdiction or power of a Justice of this Court to order a stay of a judgment or decree of a lower Court is limited to those cases and instances in which such action is necessary to preserve or protect the jurisdiction of this Court, and specifically to cases in which the "final judgment or decree * * * is subject to review by the Supreme Court on writ of certiorari" (the case pending in the District Court being such a case), and the jurisdiction or power of a Justice of this Court is limited to ordering a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." The motion filed by petitioners does not show that petition for certiorari will be filed, though counsel for petitioners stated on hearing that such a petition would be filed.

(b) Appeal is pending in the United States Court of Appeals for the Fifth Circuit and is set for submission and argument on Monday, October 4, 1948.

(c) The District Judge and Honorable Joseph C. Hutcheson, Circuit Judge, have each refused to stay the injunction order,—the latter stating that as a Judge of the United States Court of Appeals he was without power to grant a stay and that his refusal was without prejudice to the right of petitioners to

present to the Circuit Court a motion to stay.

(d) It is not shown that a motion to stay has been filed in the United States Court of Appeals having jurisdiction of the appeal or that a stay order has been denied by said Court.

(e) This is not a case in which certiorari before judgment will reasonably or probably be granted.

(f) It is not made to appear by petitioners' motion (1) that the District Court did not have jurisdiction of the action there pending, (2) that the District Court did not have power or jurisdiction to grant the temporary injunction, (3) that the temporary injunction was not necessary to preserve the status quo of the subject-matter of the action pending in the District Court, (4) that there was a clear abuse of discretion in granting the temporary injunction, (5) that a decided balancing of conveniences requires a stay of the temporary injunction, or (6) that the stay will not destroy the status quo and effectively deprive respondent of the rights claimed by him under the Constitution and laws of the United States in his pleadings in the District Court.

(g) It appears from the face of petitioners' motion in this Court that the temporary injunction was necessary to pre-

serve the status quo of the subject-matter of the action, and that to stay the force of the temporary injunction is to destroy the rights claimed by respondent under the Constitution and laws of the United States in his pleadings in the action pending in the District Court.

Wherefore, respondent prays that the order made on September 28, 1948, staying the temporary injunction granted by the District Court be vacated and petitioners' motion dismissed; and for proper order restoring the status existing at the time the stay order was made.

Respectfully submitted,

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(referred to herein as Respondent)

In the Supreme Court of the United States

OCTOBER TERM, 1948

MOTION NO.....

COKE R. STEVENSON,
Movant

VS.

LYNDON B. JOHNSON ET AL,
Respondents

MEMORANDUM OF AUTHORITIES

I.

To the Supreme Court of the United States:

Coke R. Stevenson and Lyndon B. Johnson were candidates in the Democratic primary election held in Texas on August 28, 1948, for the party nomination for United States Senator from Texas. The returns as certified by the chairmen of the several County Democratic Executive Committees and canvassed by the State Democratic Executive Committee showed that out of nearly one million votes cast in the primary, Lyndon B. Johnson received a majority over Coke R. Stevenson of eighty-seven (87) votes.

The State Democratic Committee made its canvass on September 13, 1948, and on September 14, 1948, certified the results thereof to the State Democratic Convention. The statutes of Texas provide for this procedure, and that the report of the State Executive Committee to the State Convention may be approved or rejected by the Convention. Articles 3127 and 3137, *Vernon's Texas Civil Statutes.*) The State Executive Committee, in canvassing the returns from the counties, acts as a canvassing board and does not have power to conduct an election contest. (*Ferguson vs. Huggins*, 122 Tex. 95.) The State Democratic Convention approved the report of the State Executive Committee. The statutes further provide that the chairman and secretary of the State Convention shall certify to the Secretary of State the names of the party nominees for the various state offices to which persons are to be elected at the general election to be held on the first Tuesday in November. (Article 3138, *Vernon's Texas Civil Statutes.*) Such a certificate was signed by the chairman and secretary of the State Democratic Convention on September 14, 1948, showing that Lyndon B. Johnson was the party nominee for United States Senator from Texas. The certificate was signed prior to the granting of the restraining order hereafter mentioned, but it was not delivered to the Secretary of State until after the restraining order was granted.

The statutes provide that the Secretary of State shall thirty days before the election prescribe and furnish to certain county officers forms of blanks to be used in the general election and certify the names

of the various candidates for state offices whose names are to appear on the general election ballot. These names are to be posted by the several County Clerks for ten days before he orders the ballots printed, and absentee voting is permitted to begin twenty days before the day on which the election is to be held. (Articles 2925, 2956 and 3132, *Vernon's Texas Civil Statutes.*)

On September 15, 1948, Honorable T. Whitfield Davidson, Judge of the District Court of the United States for the Northern District of Texas, granted a temporary restraining order on respondent's complaint. In effect, the order was to restrain, pending hearing, the Chairman and Secretary of the State Democratic Convention from certifying the name of Lyndon B. Johnson to the Secretary of State as the nominee of the Democratic party for United States Senator from Texas. The certificate had been signed by the Chairman and Secretary before the restraining order was granted, but it was not delivered to the Secretary of State until after the order was made. Thereafter respondent amended his complaint to make the Secretary of State and the members of the Election Board of Tarrant County, Texas, the latter as representatives of a class, parties defendant. On the amendment the District Judge extended the restraining order, in effect, to restrain certifying and printing of Lyndon B. Johnson's name on the official election ballot pending hearing, and the order was made returnable for a hearing before the District Court on September 21, 1948.

Upon hearing before the District Court, a temporary injunction was granted, in effect, restraining

the Secretary of State from certifying petitioner Johnson's name and the election boards from printing his name on the ballot pending further hearing.

An appeal has been prosecuted by petitioners from this order; and the record has been filed in the United States Court of Appeals, and the same set for submission on October 4, 1948.

Respondent's action in the District Court was brought under Section 43, Title 8, *United States Code Annotated.* Jurisdiction was in the District Court under Section 1331 and paragraph (3) of Section 1343 of Title 28, *United States Code*, 1948.

Respondent alleged, in substance, that he was a candidate for nomination by the Democratic party at the general party primary held on August 28, 1948; that fraudulent election returns were certified by the Chairman of the County Democratic Executive Committee of Jim Wells County, Texas, and by the County Chairman of Zapata County, Texas; that by said fraudulent returns more votes were fraudulently and falsely reported for petitioner Johnson than the eighty-seven (87) majority accorded to petitioner Johnson in the canvass by the State Democratic Executive Committee; that nomination by the Democratic party in Texas is tantamount to election; and that the laws of Texas as construed by the Supreme Court of Texas do not afford a means of contesting a statewide primary election. (*Sterling vs. Ferguson*, 122 Tex. 122.) By trial amendment respondent alleged that the returns from Duval County, Texas, to the State Democratic Executive Committee showing a vote in Duval County of 4,622 for petitioner Johnson to 40 for respondent were fraudulent on their face.

Prior to the time that the District Judge signed the temporary injunction order three voters were allowed to intervene. They adopted respondent's complaint and the amendment thereto, and alleged that they had voted for respondent in the Texas primary election held on July 28, 1948, and that they had been deprived of their rights as voters in that their votes had been diluted and canceled by fraudulent returns as alleged in the complaint and amendment.

Respondent prayed for injunction, for cancellation of the certificate of the Chairman and Secretary of the State Democratic Convention and for declaration by the Court that he was entitled to the nomination.

It was respondent's position on the hearing for temporary injunction that the Constitution and laws of the United States secure to him, as a candidate for the nomination and as a voter, the right to an honest count of the votes cast and honest returns reporting the results of the election; that the fraudulent returns, if given effect, would have the result of depriving him of rights secured to him by the Constitution and laws of the United States and that under Section 43 of Title 8 of the *United States Code Annotated*, he was entitled to redress by actions at law, "suit in equity or other proper proceeding for redress" in a United States District Court.

II.

Petitioners' motion, properly construed, is a petition for prohibition, and the stay order was erroneously and improvidently granted.

An original proceeding in this Court or before a Justice thereof declared to be "for a stay of a tem-

porary injunction issued by" a United States District Court, and "for a stay of other proceedings in the said District Court," with a prayer that "an order be issued staying the temporary injunction" and "staying all further proceedings in that Court until further order of the Supreme Court," as is true of petitioners' pleading, is essentially a petition for prohibition.

Title 28, Section 1651, United States Code, 1948, provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions agreeable to the usages and principles of law.
>
> "(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Under this statute it is only the court, and not a justice or judge thereof, that could grant the relief prayed for in petitioners' motion.

A writ of prohibition will ordinarily issue only in cases of manifest or extreme necessity and in matters of special emergency. Generally three things must concur to justify the issuance of the writ against a court: (1) that the court is exercising judicial or quasi-judicial power; (2) that the exercise of such power is unauthorized by law; (3) that it will result in injury for which there is no other adequate remedy. Where there is jurisdiction in a lower court of a proceeding pending there, a writ of prohibition ordinarily will not issue. (*Ex parte*

Bakelite Corporation, 279 U. S. 438; *Ex parte Southwestern Surety Ins. Co.*, 247 U. S. 19; 42 *Am. Jur.* 141-143; 50 *C. J.* 662-663.)

Ordinarily where a writ of prohibition is sought to prohibit the prosecution of litigation in a subordinate court, the judge of the court is a necessary party. (50 C. J. 699.)

The complaint and amended complaint attached to petitioners' motion state a case within the jurisdiction of the District Court. (Title 8, Section 43, United States Code Annotated; Title 28, United States Code, 1948, Sections 1331 and 1343(3); *United States vs. Classic*, 313 U. S. 299; *United States vs. Saylor*, 322 U. S. 385; *Bell vs. Hood*, 327 U. S. 678; *Cohens vs. Virginia*, 6 Wheat. 264, 379; *Osborn vs. Bank of United States*, 9 Wheat. 738, 882.) The correct decision of respondents' action in the District Court depends upon a construction of the Constitution and statutes of the United States.

III.

If petitioners' motion is treated as only a motion to stay the temporary injunction granted by the District Court after hearing, the stay order was erroneously and improvidently made.

The jurisdiction or power of a justice of the Supreme Court to stay a judgment or decree of a lower court is limited to those cases and instances in which such action is necessary to preserve or protect the jurisdiction of this Court, and specifically to cases in which the "final judgment or decree * * * is

subject to review by the Supreme Court on writ of certiorari," and then only "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." (Title 28, United States Code, Section 2101(e). The statute limits the granting of the stay to "a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." Supersedeas or stay proceedings in cases taken to the Supreme Court by appeal from Courts of Appeals or by direct appeal from a District Court or a three-judge court are governed by Rule 62 of The Federal Rules of Civil Procedure. (Reviser's notes to the Act of Congress approved June 25, 1948, effective September 1, 1948, Title 28, United States Code.)

The granting of a stay order is discretionary and ordinarily it will not be granted except a strong showing be made of a need for the relief and the propriety of it and that the case is one in which probable grounds exist for the issuance of a writ of certiorari by the Supreme Court. (*Magnum Import Company vs. Coty*, 262 U. S. 159, 163.)

An application for a stay should ordinarily be first presented to the judge of the court whose judgment or decree is to be reviewed, (*Magnum Import Company vs. Coty*, 262 U. S. 159, 163); and if refused the application may then be presented to a justice of the Supreme Court (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, 833-834). In this instance the appeal from the order of the trial court has been lodged in the Court of Appeals but no application for a stay has been presented to that court. Generally an appellate

court will not, pending an appeal, suspend an injunction prior to a hearing on the merits after the trial court has refused to grant a stay. (*Magnum Import Company vs. Coty*, 262 U. S. 159; *American Strawboard Company vs. Indianapolis Water Company* (7th Cir.), 81 Fed. 423.)

This case is not a case in which a petition for certiorari will reasonably or probably be granted before judgment of the Court of Appeals because (1) writs of certiorari are seldom granted in such cases and the power is one "not ordinarily to be exercised" (*The Three Friends*, 166 U. S. 1), and it has been only under unusual circumstances that the power has been exercised (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, 204-206, 620-622); and (2) on the appeal to the Court of Appeals from the order granting the interlocutory injunction, the reviewable questions as appear from petitioner's motion would be (a) the jurisdiction of the District Court and (b) whether the granting of the temporary injunction was an abuse of discretion; and (3) the appeal pending in the Court of Appeals will, it appears, be argued and under submission before any petition for certiorari is filed, and ordinarily writ of certiorari would not be granted under such circumstances. (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, 621.)

It is apparent from the foregoing statement of the Texas election procedure and the statutes cited that the temporary injunction granted by the trial Court was necessary to preserve the status quo and that the stay order will have the effect to destroy the

status quo and, in effect, dispose of the case upon its merits and deprive respondent of redress in equity as secured to him by the provisions of Section 43, Title 8, United States Code Annotated, against the deprivation of rights secured to him by the Constitution and laws of the United States.

Upon vacating the stay order, the Court has power to take such action as is necessary to restore the status existing at the time the stay order was made. (*Lawrence vs. St. Louis-San Francisco Ry. Co.*, 278 U. S. 228, 233; *Arkadelphia Milling Co vs. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 145.)

Wherefore, respondent prays that the stay order be vacated and petitioners' motion dismissed; and for proper order restoring the status existing at the time the stay order was made.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

LYNDON B. JOHNSON, in his individual capacity, and V. F. STRIEGLER, County Judge of Blanco County, Texas, and FRANK SHELLEY, Sheriff of said County, and C. H. STEVENSON, County Clerk of said County, in their official capacity as members of and constituting the Election Board of said County and as representatives of the Election Boards of the other Counties of Texas as a class, *Petitioners*,

v.

COKE R. STEVENSON, *Respondent*.

No. 466

SUPPLEMENTAL MOTION FOR STAY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

LYNDON B. JOHNSON, in his individual capacity, and V. F. STRIEGLER, County Judge of Blanco County, Texas, and FRANK SHELLEY, Sheriff of said County, and C. H. STEVENSON, County Clerk of said County, in their official capacity as members of and constituting the Election Board of said County and as representatives of the Election Boards of the other Counties of Texas as a class, *Petitioners*,

v.

COKE R. STEVENSON, *Respondent.*

No. .....

SUPPLEMENTAL MOTION FOR STAY.

To the Honorable the Chief Juctice of the United States and the Associate Justices of the Supreme Court of the United States:

Lyndon B. Johnson, in his personal capacity, and V. F. Striegler, County Judge of Blanco County, Frank Shelley, Sheriff of Blanco County, and C. H. Stevenson, County Clerk of Blanco County, Texas, in their official capacity as members of and constituting the Election Board of Blanco County, Texas, and as representatives of the Elec-

tion Boards of the other counties of Texas, as a class, file this supplemental motion for a stay of the Temporary Injunction and of all proceedings in the United States District Court for the Northern District of Texas, Fort Worth Division, in and with respect to the action entitled Coke R. Stevenson, Plaintiff, versus Tom L. Tyson, et al., defendants, Civil No. 1640.

On September 29, 1948, Mr. Justice Black, as an Associate Justice of this Court, on motion of petitioners herein, granted a stay of the Temporary Injunction issued by the aforesaid United States District Court in the aforesaid cause. This stay provided that the Temporary Injunction "is and shall be of no force and effect, until further order of the Supreme Court."

In filing this Supplemental Motion for a Stay, petitioners wish to make it clear that they have no doubt as to the authority of Mr. Justice Black, as a single Justice of this Court, to issue the stay described above, or as to the validity of that stay. This Supplemental Motion is not filed to supersede or nullify the original Motion presented to him. But since that stay was subject to the order of this Court, petitioners deem it advisable to file with this Court their motion which will provide this Court with a basis upon which it may act independently of Mr. Justice Black's order, if it so chooses. In addition, petitioners renew their prayer that all proceedings in the District Court, and not merely the Temporary Injunction, be suspended until determination of the issues on appeal.

This motion is filed pursuant to the provisions of Sections 2101 (e), 1651, 1254 and 1292 of Title 28 of the United States Code; and Rule 38, Paragraph 6, of the Supreme Court of the United States.

In support of this Motion, petitioners allege and show the following:

1. The history of these proceedings and the reasons why it is imperative that the Temporary Injunction and the proceedings in the District Court be stayed, are set forth

in the Motion for Stay which petitioners filed in this Court and addressed and presented to Mr. Justice Black, and upon which he issued his Order staying the Temporary Injunction. That petition is attached hereto, marked Annex "A" for convenience of reference, and made a part hereof as if specifically alleged.

2. As Annex "A" relates in detail, the District Court on September 23, 1948, entered a Temporary Injunction (Exhibit D to Annex "A") which had the effect of preventing the Secretary of State of Texas and the county election boards of that State from taking the steps necessary under the laws of Texas to place the name of Lyndon B. Johnson on the ballot for purposes of the general election to be held on November 2, 1948, as the nominee of the Democratic Party of Texas for United States Senator. Johnson had been duly elected as the candidate of the Democratic Party at the second primary election held under the laws of Texas, and all steps had been duly taken under the laws of Texas except the formal ministerial acts of certification of his name by the Secretary of State, the posting of his name by the various local election boards, the printing of the ballots including his name, and the distribution of those ballots. The District Court was without jurisdiction or justification to enter this Temporary Injunction.

3. Upon the entry of the Temporary Injunction, petitioners herein filed their notice of appeal. On September 24, 1948, they docketed their appeal in the Court of Appeals for the Fifth Circuit. At the same time, they presented to the Honorable Joseph C. Hutcheson, Jr., Chief Judge of that Court, a motion for a stay pending the determination of the appeal. Judge Hutcheson held that he, as a single Judge of the Court, had no authority to grant a stay of a Temporary Injunction. (Exhibit E to Annex "A"). The Court of Appeals was not in session and would not convene until October 4. The appeal was set for hearing before the Court on Monday, October 4, 1948.

4. Unless the Temporary Injunction were immediately stayed, petitioner Johnson's name could not be posted for inclusion on the ballot as the candidate of the Democratic Party for United States Senator, since the laws of Texas require that a candidate's name be posted for ten days before it may be printed on the ballots, and that the ballots be available for distribution to absentee voters twenty days before the general election. The effect of these provisions of Texas law is that Johnson's name would have to be posted not later than October 2, for purposes of the general election on November 2. In addition, time is required, before even posting can begin, for the Secretary of State to certify Johnson's name to the 254 county election boards throughout the State. The Secretary of State, by affidavit filed as Exhibit F to Annex "A", affirms that he is required to begin certifying names of candidates on or about September 27 in order that those names might be placed on the ballot in accordance with the laws of Texas.

5. Petitioners invoked the jurisdiction of Mr. Justice Black because the Court of Appeals for the Fifth Circuit was not in session; because Chief Judge Hutcheson determined that he as a single judge of that Court had no jurisdiction to consider petitioners' application for a stay, and because unless relief were secured well before October 4, when the Court of Appeals convenes, this cause would become moot with respect to including the name of Johnson on the ballot, the position of Johnson would be forfeited and destroyed, and appellate jurisdiction would be defeated.

6. Petitioners have not yet filed their petition for a writ of certiorari. They propose to do so as soon as that petition can be prepared and the record below certified and filed with this Court, unless on Monday, October 4, the Court of Appeals for the Fifth Circuit shall determine that it may hear and decide petitioners' appeal and unless it proceeds to decide the appeal in their favor. In the event that the Court of Appeals shall not hear the appeal or shall decide the issues therein adversely to appellants, petitioners will forth-

with file with this Court their petition for writ of certiorari.

7. It is essential that the stay of the Temporary Injunction be continued in effect. Petitioners are informed that following the suspension of the Temporary Injunction by order of Justice Black, the Secretary of State of Texas began certifying to the county election boards the name of petitioner Lyndon B. Johnson as the candidate of the Democratic Party for the office of United States Senator. However, these county boards must post Johnson's name for ten days and must print and distribute ballots including Johnson's name, if his name is to appear on the ballot for purposes of a general election on November 2. If the Temporary Injunction is not stayed and if it becomes operative, the provisions of that injunction will restrain and prevent the county election boards from posting Johnson's name and from printing or distributing ballots including his name.

8. It is also necessary that the effect of the stay issued by Mr. Justice Black be enlarged to include the suspension of any further proceedings in this action by the District Court until appellate determination of the issues presented by the appeal. By the order of the United States District Judge issued in this action on or about September 24, after the Temporary Injunction was issued, Special Masters were appointed to hold hearings and take evidence "as may be necessary for a full investigation of the facts as to the conduct and results of said primary election" in Jim Wells, Duval and Zapata Counties in the State of Texas. A copy of the aforesaid order of the District Judge is attached hereto as Annex "B". Although we are informed that upon notification of the stay issued by Mr. Justice Black, the District Judge advised the Special Masters to suspend their investigation, he has ordered them to report to him their findings prior to such suspension. The District Judge has indicated that he proposes to proceed to take evidence and determine the issues for purposes of a final injunction.

9. Unless further proceedings in the District Court are stayed and, if the District Court proceeds to take evidence and consider the issuance of a final injunction, the uncertainty and confusion caused thereby may induce various of the 254 county election boards in Texas to refrain from posting or printing on the ballots the name of Lyndon B. Johnson.

10. Unless further proceedings in the District Court are stayed, the District Judge may enter a final injunction notwithstanding his lack of jurisdiction and the pendency of the issue of jurisdiction in the appellate courts. The result of such action would be to prevent the name of petitioner Johnson from being placed on the ballot for the general election since it would be impossible to secure relief from such unlawful and unauthorized order in time to be effective.

11. The continuation and enlargement of the stay herein are necessary to protect the appellate jurisdiction of this Court since otherwise the question whether the United States District Court may prevent the name of petitioner Johnson from being placed on the ballot will be moot and to prevent irreparable injury to petitioner Johnson which will result if his name is not included on the ballot. The construction and enlargement of the stay are also necessary in the public interest and as a matter of national importance because of the interest of the people of Texas and the nation in the orderly election of a United States Senator from the State of Texas, and also because of the vital interest of the nation in the orderly conduct of elections in the various states, free from interference by the injunctive processes of the federal courts.

WHEREFORE, petitioners pray in the alternative (1) that an order be issued staying the Temporary Injunction issued by the Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, in the case entitled Coke R. Stevenson v. Lyndon B. Johnson, et al., Civil No. 1640, and staying all further proceedings in that Court in said action until further order

of the Supreme Court of the United States; or (2) that an order be issued by this Court staying the aforesaid Temporary Injunction; or (3) that this Court allow and permit the order issued by Mr. Justice Black on September 29, 1948, to continue in full force and effect until final determination of appellate proceedings with respect to the aforesaid Temporary Injunction order.

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ANNEX "A"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

LYNDON B. JOHNSON, in his individual capacity, and V. F. STRIEGLER, County Judge of Blanco County, Texas, and FRANK SHELLEY, Sheriff of said County, and C. H. STEVENSON, County Clerk of said County, in their official capacity as members of and constituting the Election Board of said County and as representatives of the Election Boards of the other Counties of Texas as a class, *Petitioners*,

v.

COKE R. STEVENSON, *Respondent*.

No. .....

MOTION FOR STAY.

To the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States:

Lyndon B. Johnson, in his personal capacity, and V. F. Striegler, County Judge of Blanco County, Frank Shelley, Sheriff of Blanco County, and C. H. Stevenson, County Clerk of Blanco County, Texas, in their official capacity as members of and constituting the Election Board of Blanco County, Texas, and as representatives of the Election Boards of the other counties of Texas, as a class, now file

this motion for a stay of a temporary injunction issued by the United States District Court for the Northern District of Texas, Fort Worth Division, and for a stay of other proceedings in the said District Court.

In support of their Motion, Petitioners respectfully show:

1. This motion is filed in aid of the appellate jurisdiction of the Supreme Court and pursuant to the provisions of Sections 1254, 1292, 1651 and 2101 of Title 28 of the United States Code and Rule 38(6) of the Supreme Court.

History of the Proceeding.

2. Your Petitioner Lyndon B. Johnson, being a citizen of the State of Texas and in every way qualified and in no way disqualified to hold the office of United States Senator of and from the State of Texas, was a candidate for nomination by the Democratic Party of Texas as its nominee for said office at the Second Primary Election of the Democratic Party of Texas duly conducted and held in accordance with the statutes of Texas on August 28, 1948.

3. As provided by the Statutes of Texas, the State Executive Committee for the Democratic Party of Texas duly convened and met in Forth Worth, Texas, on Monday, September 13, 1948, for the purpose of canvassing the returns of said election as certified to the Chairman of said Committee by the Chairmen of the Democratic Executive Committees of the 254 counties of Texas in which such election was held, the purpose of the canvass being to tabulate the returns so made and to determine the results of said Primary Election. The said State Executive Committee did canvass and tabulate the returns as canvassed by the several county executive committees and certified by the Chairmen thereof to the Chairman of the State Executive Committee, and as a result of said canvass and tabulation by said State Executive Committee of the Democratic Party, it determined that Petitioner Lyndon B. Johnson received

a majority of the votes cast in said Democratic Primary Election for all candidates for the office of Democratic nominee for United States Senator.

4. The said State Executive Committee of the Democratic Party duly certified the results of its canvass and tabulation to the Chairman of the State Convention of the Democratic Party convened and held in the city of Fort Worth, Texas, on September 14, 1948, all in acordance with and as provided by Statute.

5. Thereafter, on said 14th day of September, 1948, the said State Convention of the Democratic Party approved the returns so tabulated and certified to it by the said State Executive Committee, and the said Convention and the several delegates, members and officers thereof, duly and regularly confirmed the nomination of Petitioner Lyndon B. Johnson and declared him to be the nominee of the Democratic Party of Texas as its candidate for the office of United States Senator of and from the State of Texas at the General Election to be held in the State of Texas on the first Tuesday in November, 1948.

6. Upon the adjournment of said State Convention, and on September 14, 1948, Honorable Tom L. Tyson, the Chairman of said Convention, and Honorable Vann M. Kennedy, the Secretary thereof, duly certified to the Secretary of State of the State of Texas, Honorable Paul H. Brown, that said Lyndon B. Johnson had been declared the nominee of the Democratic Party of Texas as its candidate for United States Senator in the General Election to be held on the first Tuesday in November, 1948, and issued a certificate to the Secretary of State so certifying, all as provided by the Statutes of the State of Texas.

7. It is established law of the Sate of Texas, as declared by the Supreme Court of Texas (*Sterling* v. *Ferguson*, 122 Texas 122, 53 S. W. (2) 133), that the certificate of nomination issued by the said State Convention of the Demo-

cratic Party is final, conclusive, and not subject to judicial review except by an election contest held under and pursuant to the Statutes of the State of Texas (No such election contest of the nomination of the said Lyndon B. Johnson has been instituted.) and gives to Lyndon B. Johnson a standing and a right which entitles him to have his name printed upon the official ballot to be voted at the General Election on the first Tuesday of November, 1948.

8. It is likewise the law of the State of Texas that it is now the statutory duty of said Paul H. Brown, in his capacity as Secretary of State of the State of Texas, to certify to each of the County Clerks of the 254 counties of the State of Texas the name of this Petitioner as the nominee of the Democratic Party of Texas as its candidate for the office of United States Senator of and from the State of Texas in the General Election to be held in said State of Texas on the first Tuesday of November, 1948; and it is likewise the duty of the County Judges, County Clerks and County Sheriffs, constituting the election boards in the 254 counties of Texas, to take all necessary steps to have the name of said Lyndon B. Johnson printed on the official ballot to be used at said General Election as the Democratic candidate for the office of United States Senator of and from the State of Texas. The Statutes of Texas further provide that the names of all nominees and candidates for the various offices to be voted upon at the General Election be duly certified and furnished by the Secretary of State to the election boards of the 254 counties in time so that election notices carrying the names of the candidates may be posted for at least ten (10) days before the said election officials order the printing of the ballots for use in the General Election. The Statutes of Texas also provide that the official ballots which are to be used by all voters in the General Election be printed and available for distribution to absentee voters twenty (20) days prior to the date of the General Election.

9. On the 15th day of September 1948, following the final certification of Petitioner Lyndon B. Johnson's name as aforesaid, Coke R. Stevenson, the respondent herein, the opponent of Petitioner Lyndon B. Johnson in said Democratic Primary Election held on August 28, 1948, filed in the District Court of the United States for the Northern District of Texas a Complaint naming as Defendants the said Tom L. Tyson and Vann M. Kennedy, Chairman and Secretary, respectively, of the said State Democratic Convention, and Petitioner Lyndon B. Johnson, as Defendants. In the Complaint, Coke R. Stevenson asked that the Court issue a peremptory order restraining the Defendants, Tyson and Kennedy, as Chairman and Secretary of the State Democratic Convention, from issuing a certificate of nomination of Lyndon B. Johnson, and for other relief.

10. The said Complaint was presented to the Honorable T. Whitfield Davidson as United States District Judge of the District Court of the United States for the Northern District of Texas, at a point outside the said district, at 6:25 A.M. on September 15th and the said Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, forthwith endorsed thereon an order restraining said Tyson and Kennedy as prayed for pending a hearing on September 21, 1948, at 10:00 A. M. at Fort Worth, Texas, at which date the temporary restraining order was made returnable. The Complaint and Order were filed in the office of the Clerk of the District Court of the United States for the Northern District of Texas, Fort Worth Division, at 1:00 o'clock P. M. on the 15th day of September, 1948. A true copy of said Complaint and Order of the said Honorable T. Whitfield Davidson, Judge of the United States District Court for the Northern District of Texas, made thereon marked Exhibit A is attached hereto and made a part hereof. Prior to the presentation of said Complaint to the said Honorable T. Whitfield Davidson, Judge of the

United States District Court for the Northern District of Texas, and prior to the entry of his Order thereon, and prior to the filing of said Complaint, the defendants Tyson and Kennedy in their capacities as Chairman and Secretary, respectively, of the State Democratic Convention, had certified to the Secretary of State of the State of Texas the nomination of Petitioner Lyndon B. Johnson as aforesaid.

11. Thereafter, on September 16, 1948, at 8:35 P. M., said Stevenson filed in the United States District Court for the Northern District of Texas an amended Original Complaint naming as additional Defendants Paul W. Brown, as Secretary of State of the State of Texas, Clarence O. Kraft, County Judge of Tarrant County, Texas, Melvin Faulk, County Clerk of Tarrant County, Texas, and Sully Montgomery, Sheriff of Tarrant County, Texas, constituting the Election Board for Tarrant County, Texas, and as representatives of a class consisting of the election boards of the 254 counties of Texas. In the Amended Complaint said Stevenson sought an amended restraining order restraining the Secretary of State from certifying the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from Texas to the several County Clerks, and restraining the several County Election Boards from preparing and distributing any official ballots for use in the General Election to be held on November 2, 1948, which contained the name of Lyndon B. Johnson as such candidate. Whereupon, the said Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, entered thereon an "Enlarged Restraining Order", restraining all of the Defendants as prayed for in said Amended Original Complaint which restraining order was made returnable on September 21, 1948, at 10:00 o'clock A. M. in Fort Worth, Texas. A true copy of such Amended Original Complaint and the "Enlarged Restraining Order" entered thereon by the said Honorable T. Whit-

field Davidson, marked Exhibit B, is attached hereto and made a part hereof.

It is not alleged in the Original or the Amended Complaint that any defendant in the action acted willfully, purposefully, intentionally, or knowingly, to deprive Plaintiff of any right he may have under the Constitution or laws of the United States; nor is it alleged in either pleading that the Defendants in such action entered into a conspiracy among themselves or with any other persons to deny the Plaintiff any right guaranteed to him under the Constitution or laws of the United States.

12. The Petitioner Lyndon B. Johnson filed in the United States District Court for the Northern District of Texas a plea to dismiss the cause of action for want of jurisdiction on the grounds hereinafter set out, and on other grounds, all as shown by said plea, a true copy of which, marked Exhibit C, is attached hereto and made a part hereof.

13. On September 22, 1948, the Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, after hearing argument, denied Petitioners' motion to dismiss and announced, after hearing evidence, that he would grant the injunction prayed for by the said Coke R. Stevenson. On September 23, 1948, the said Honorable T. Whitfield Davidson signed the Temporary Injunction which, among other things, enjoined the Honorable Paul H. Brown as Secretary of State of the State of Texas from certifying the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from Texas to the election officials of the several counties of Texas and further restrained the election officials of the several counties of Texas from preparing and distributing official ballots for use in the General Election to be held November 2, 1948, carrying the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United

States Senator from the State of Texas. A true copy of the said Temporary Injunction marked Exhibit D is attached hereto and made a part hereof.

14. On September 22, 1948, Petitioners applied to the said T. Whitfield Davidson for a stay of the said Temporary Injunction pending an appeal to the Circuit Court of Appeals for the Fifth Circuit and this application was forthwith denied.

15. The said T. Whitefield Davidson, after issuing the Temporary Injunction as aforesaid, announced that he would appoint commissioners to take testimony concerning the election frauds alleged in Plaintiff's Complaint at the locality in which the alleged frauds took place. Thereafter the said T. Whitfield Davidson did appoint two Commissioners to take testimony concerning the said alleged election frauds and your Petitioners are informed and believe that the two commissioners so appointed are now preparing to take such evidence.

16. On September 24, 1948, Petitioners herein docketed in the United States Circuit Court of Appeals for the Fifth Circuit, an appeal from the Order of the said T. Whitfield Davidson granting the temporary injunction and applied to the Honorable Joseph C. Hutcheson, Jr., Circuit Judge of the said United States Circuit Court of Appeals for the Fifth Circuit, for an Order staying the said Temporary Injunction, pending the determination of the appeal. On September 24, 1948, Honorable Joseph C. Hutcheson, Jr., denied the motion for a stay without prejudice to the right of Petitioners to present the motion to the full court on the ground that a single circuit judge had no authority to grant a stay in an appeal from an interlocutory injunction. A true and correct copy of the opinion of the said Joseph C. Hutcheson, Jr., marked Exhibit E is attached hereto and made a part hereof. The said motion has now been set down for hearing before three Judges of the Court of Ap-

peals on October 4, 1948. Petitioners requested an earlier hearing but the Court of Appeals failed to grant the request.

17. On September 25th, 1948, the Petitioners herein filed in the United States Circuit Court of Appeals for the Fifth Circuit a petition for a writ of mandamus and prohibition. In the said petition the Petitioners asked the Court of Appeals to prohibit the Honorable T. Whitfield Davidson from assuming, or attempting to assume, jurisdiction in this case and to order him to dissolve the Restraining Orders and Temporary Injunction hereinbefore described and to dismiss the action now pending before him. The application for the writ of mandamus and prohibition has not been heard by the Circuit Court of Appeals for the Fifth Circuit and the earliest date on which that Court will decide whether to entertain the application will be October 4, 1948.

Lack of Jurisdiction in the District Court.

18. For the following reasons, among others, the Petitioners submit that the United States District Court for the Northern District of Texas has no authority or jurisdiction to hear or to adjudicate this proceeding and all of the orders and the Temporary Injunction issued in this proceeding by the Honorable T. Whitfield Davidson, as District Judge for the United States District Court for the Northern District of Texas, have no basis whatsoever in law.

(a) Because the Complaint and Amended Complaint affirmatively show that the relief sought by the Plaintiff, Coke R. Stevenson, is relief that can be obtained only as a result of an election contest under the laws of the State of Texas of the Primary Election held by the Democratic Party of the State of Texas on August 28, 1948, and is not relief that any Court of the United States has jurisdiction to grant;

(b) Because it affirmatively appears from the Complaint and Amended Complaint herein that the Plaintiff, Coke R.

Stevenson, seeks to have the United States District Court for the Northern District of Texas adjudicate the validity of lawful and fully executed certifications from the legally authorized officers of the Democratic Party of the State of Texas and the Courts of the United States have no jurisdiction to adjudicate this subject matter;

(c) Because the right of Petitioner Lyndon B. Johnson to certification and inclusion as the nominee and candidate of the Democratic Party for the State of Texas for United States Senator upon the ballot to be voted on at the General Election to be held on November 2, 1948, has irrevocably and uncontestably vested under the laws of the State of Texas and is not subject to the process of, or to adjudication by, the Courts of the United States.

(d) Because it affirmatively appears from the Complaint and the Amended Complaint that the suit involves the title and right to the Democratic nomination as candidate for the United States Senate from the State of Texas and Section 1344 of Title 28 of the United States Code deprives the District Courts of the United States of jurisdiction of such a suit;

(e) Because it appears affirmatively from the Complaint and Amended Complaint that the cause of action asserted in this suit does not arise under the laws of the United States and does not involve property or civil rights protected by the laws of the United States but relates only to political rights as to which a United States District Court has no jurisdiction, either under Section 43 of Title 8 of the United States Code or any other statute of the United States, to grant equitable relief;

(f) Because the suit seeks to have a District Court of the United States adjudicate subject matter which under the provisions of Section I of Article 5 of the Constitution of the United States lies within the sole and exclusive jurisdiction of the Senate of the United States.

The Effect of the Temporary Injunction.

19. Notwithstanding the want of authority or color of jurisdiction on the part of the Honorable T. Whitfield Davidson, Judge of the District Court for the Northern District of Texas, to enter the temporary injunction hereinbefore described, the said Paul H. Brown as Secretary of State for the State of Texas has announced that he will observe the Temporary Injunction and will not, so long as the said Injunction is allowed to stand, certify to the election officers of the several counties of Texas, the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from Texas at the general election to be held on November 2, 1948.

20. The unlawful, invalid, improvident and void Temporary Injunction issued by the said T. Whitfield Davidson, Judge of the United States District Court for the Northern District of Texas, has prevented, and threatens for an indefinite period to continue to prevent, the said Honorable Paul H. Brown, Secretary of State of the State of Texas, from certifying to the election officials of the several counties of Texas the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from Texas.

21. Article 206 of the Penal Code of Texas provides that after the County Clerk of each county in Texas receives the names of candidates that have been certified to him by the Secretary of State, the County Clerk shall post at a conspicuous place in his office for the inspection and information of the public, the names of all candidates that have been so certified for at least ten (10) days before he orders the names of the candidates be printed on the ballot and further provides that in case the County Clerk refuses or neglects to comply with this requirement, he shall be fined not less than $200. nor more than $500. In *Sterling* v. *Ferguson*, 122 Texas 122, 53 S. W. (2d) 753, 760, the

Supreme Court of Texas said of this provision of the statute:

> "Since the county clerks cannot post the names of candidates lawfully certified to them as provided in the Penal Code, art. 206, until the names of state candidates have been certified to them by the secretary of state, it follows that the certificate of the secretary of state containing the names of state candidates must reach the county clerks in time for those officers to substantially perform their statutory duty and post the list of certified names before they order the ballots printed."

22. The laws of Texas also require that the official ballots that are to be used by all electors in a general election be available for distribution to absentee voters at least twenty (20) days before the date of the General Election.

23. Because of the provisions of the laws of Texas described in paragraphs 21 and 22, *supra*, the name of a candidate cannot be printed on the official ballots unless the certification of the name of the candidate has been received by the election officials in the several counties of Texas at least thirty (30) days prior to the date of the general election. Furthermore, as a practical matter, several days time must necessarily elapse between the date on which the Secretary of State of the State of Texas makes the actual certification of the name of the candidate and the receipt of the said certification by the election officials in all of the several counties of Texas. This interval of time is required because of the necessity of dispatching the certifications to the several county seats of Texas, many of which are located at great distances from the office of the Secretary of State.

24. It appears by the affidavit of the Honorable Paul H. Brown, Secretary of State of the State of Texas, which is marked Exhibit F and attached hereto and made a part hereof, that it is his considered opinion that as a practical

matter he must place the certifications of the names of the candidates that are to appear on the official ballots in the mails directed to the 254 County Judges in Texas, commencing on September 27, 1948, if the said certifications are to reach the various county judges in sufficient time for the county judges to comply with the applicable provisions of the laws of Texas. It further appears from the said affidavit that the said Honorable Paul H. Brown, Secretary of State of the State of Texas, will on or about September 27, 1948, mail out certificates and blanks to the various county judges of Texas without including thereon the name of Lyndon B. Johnson or the name of any other person as a candidate for United States Senator. It also appears from the said affidavit that if the Honorable Paul H. Brown is relieved from the compulsion of the said Temporary Injunction he will certify to the various county judges the name of Lyndon B. Johnson as the Democratic nominee for the United States Senate, but that each day of delay in making such certification of the name of Lyndon B. Johnson will jeopardize in an increasing number of counties the printing of ballots bearing the name of a Democratic nominee for the United States Senate.

25. The affidavits of John S. Simmang, County Judge of Lee County, Texas; John J. Burttschell, Sheriff of Lee County, Texas; Frank Shelley, Sheriff of Blanco County, Texas; C. H. Stevenson, County Clerk of Blanco County, Texas; V. E. Striegler, County Judge of Blanco County, Texas; Ford Albritton, County Clerk of Wichita County, Texas; Arthur Tipps, County Judge of Wichita County, Texas; Hammett Vance, Sheriff of Wichita County, Texas; and Miss Emilie Limberg, County Clerk of Travis County, Texas, which are collectively marked Exhibit G and attached hereto and made a part hereof, show that if the certification of a candidate is not received by the affiants from the Secretary of State of the State of Texas by October 2nd, 1948, it will be impossible for the affiants in the counties in which they serve as election officials to comply

with the law relative to the posting of the name of that candidate and the printing of ballots bearing the name of the candidate.

26. Your Petitioners state on information and belief that the facts set forth in the affidavits described in paragraph 25, *supra*, exist in the other 250 counties of the State of Texas and if the county election officials in the said other 250 counties in the said State of Texas do not receive certifications of the names of a candidate by October 2nd, 1948, it will be impossible for the said election officials to comply with the provisions of the law of Texas relative to the posting of the names of the candidate and the printing of ballots bearing the name of the candidate.

The Necessity to Protect and Preserve Appellate Jurisdiction.

27. If a stay of the unlawful and void Temporary Injunction issued as aforesaid is not granted before September 30, 1948, the said Temporary Injunction will have the effect of a final adjudication of the merits of this case. As alleged in paragraph 16, *supra*, the earliest date on which Petitioners' application for a stay can be heard by the Court of Appeals is October 4, 1948. Even if the Circuit Court of Appeals thereafter decides that the Temporary Injunction was unlawful and void, it will not be able to enter any judgment or to send down any mandate that can give effect to its decision and place the name of Lyndon B. Johnson on the official ballot as the candidate of the Democratic Party of the State of Texas for United States Senator.

28 If the said temporary injunction continues in effect until September 30, 1948, the power of the Supreme Court to review by a writ of certiorari any decree made by the Circuit Court of Appeals on Petitioners' application for a stay of the temporary injunction will be rendered wholly nugatory because no judgment or decree entered by the

Supreme Court will serve to nullify the effect of the said temporary injunction or to place the name of Lyndon B. Johnson on the official ballot as the candidate of the Democratic Party of the State of Texas for United States Senator.

29. If the said temporary injunction continues in effect until September 30, 1948, the power of the Circuit Court of Appeals and of the Supreme Court to exercise effectively their appellate power to review the merits of the case will be rendered nugatory. In such circumstances, a decision by the Circuit Court of Appeals or by the Supreme Court (on the issuance of a writ of certiorari) that the said Lyndon B. Johnson is entitled as a matter of law and right to have his name appear on the official ballot as a candidate of the Democratic Party of the State of Texas for United States Senator will be without force or effect because it will not be possible for the name of the said Lyndon B. Johnson to be placed on the said ballot.

30. For the reasons that have been set forth in paragraphs 22 to 26, inclusive, *supra,* the said temporary injunction if it continues until September 30, 1948, will make this case moot and will cause any exercise of appellate jurisdiction by either the Circuit Court or the Supreme Court to be empty and frivolous. A stay of the said temporary injunction is necessary to preserve and to protect the appellate jurisdiction of the Circuit Court of Appeals and of the Supreme Court.

Considerations of Equity and Convenience Require the Granting of the Stay.

31. An order staying and vacating the temporary restraining order will not amount to a final adjudication of the merits of the plaintiff's claim and will in no way prejudice plaintiff's rights if on final determination it is held that the Federal Courts have jurisdiction to determine whether Petitioner Lyndon B. Johnson's name should

appear on the official ballot as Democratic candidate for Senator from Texas.

32. In the event the operation of the temporary injunction is stayed and ballots are printed in time for use at the said general election to be held on November 2nd, 1948, containing the name of Lyndon B. Johnson as candidate of the Democratic Party for United States Senator, the rights of plaintiff will not be jeopardized. If the District Court has jurisdiction to determine and does determine that Lyndon B. Johnson's name is improperly or illegally on the ballot, it can after that determination restrain the issuance of a certificate of election to Lyndon B. Johnson; if the jurisdiction claimed actually exists the said District Court can restrain the counting of votes for said Lyndon B. Johnson; it can by appropriate publication of its declaration, give notice to the public before the said general election that Lyndon B. Johnson is not a legal candidate; and finally, the District Court may restrain (if its jurisdiction is what plaintiff claims it to be) Lyndon B. Johnson from taking a seat in the United States Senate. Petitioners submit that a mere recital of the exercise of such power shows that no such jurisdiction exists in any court of the United States, but in the improbable event that there is such jurisdiction, the rights of the plaintiff can be fully protected up to and after the said general election on November 2nd, 1948.

33. The temporary injunction disturbed the status quo as it existed at the time this proceeding was instituted in the District Court by depriving Lyndon B. Johnson of his right, which had vested irrevocably under the laws of Texas, (*Sterling* v. *Ferguson*, 122 Tex. 122, 53 S. W. (2d) 133) to have his name appear on the official ballot as the Democratic candidate for Senator, by interfering with the election machinery of the State of Texas, and by compelling the officials of the State of Texas to violate the ministerial duties imposed upon them by the statutes of Texas

and the said temporary injunction threatens to deprive the Democratic Party of any candidate for United States Senator on the ballots of the said general election to be held on November 2nd, 1948. An order vacating or staying said temporary injunction will restore the status quo without impairing or prejudicing the rights of plaintiff which may be protected by other adequate remedies that are available to him.

34. Unless a stay of the temporary injunction is granted, the name of no Democratic nominee for the office of United States Senator will appear on the ballot for the general election to be held on November 2nd, 1948, and the people of the State of Texas will be deprived of the opportunity of choosing a representative to the United States Senate in a lawful and orderly manner.

35. Because of the lack of time and the imminence of the national election and all of the other facts hereinbefore alleged, the only remedy that will prevent the violation of Petitioners' rights and of the right of the people of Texas to vote on official ballots prepared and distributed according to law, is an order staying and vacating the said Temporary Injunction pending the lawful and proper exercise of appellate jurisdiction by the Circuit Court of Appeals for the Fifth Circuit and the Supreme Court. Unless such a stay is granted the Petitioners will suffer immediate and irreparable injury. The jeopardy to the rights of Petitioners and the public importance of the issues in this case justify and require the immediate issuance of such a stay.

Wherefore, Petitioners pray that an order be issued staying the Temporary Injunction issued by the Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, and staying

all further proceedings in that court in this case until further order of the Supreme Court.

Respectfully submitted,

ALVIN J. WIRTZ,
Austin, Texas.

JAMES V. ALLRED,
Houston, Texas.

THURMAN ARNOLD,
Washington, D. C.

ABE FORTAS,
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Of Counsel.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil No. 1640.

COKE R. STEVENSON, *Plaintiff*,

v.

TOM L. TYSON, VANN M. KENNEDY and LYNDON B. JOHNSON, *Defendants.*

ORIGINAL COMPLAINT.

TO THE HONORABLE JUDGE OF SAID COURT:

Coke R. Stevenson, who resides in Kimble County, Texas, Plaintiff, complaining of Tom L. Tyson, who resides in Navarro County, Texas, Vann M. Kennedy, who resides in Nueces County, Texas, and of Lyndon B. Johnson, who resides in Blanco County, Texas, all referred to as defendants herein.

I.

That Tom L. Tyson was elected Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, and Vann M. Kennedy was elected Secretary thereof.

II.

The rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas for a term of six years

beginning in January, 1949, and which nomination amounts to election to the office of United States Senator from Texas for said term. The emoluments of said office exceed in amount, and therefore the value of the rights in controversy exceed in amount, the sum of Three Thousand Dollars ($3,000.00).

III.

The rights asserted in this action, and which this action is brought to enforce and protect, and the right to invoke the jurisdiction of this Court to prevent the wrongs and threatened wrongs alleged, arise under Section 4 of Article I and the Seventeenth Amendment to the Constitution of the United States, and under Section 43, Chapter 3, Title 8, United States Code, 1946, and under Sections 51 and 52, Chapter 3, Title 18, United States Code, 1948, and under Sections 241 and 242, Title 18, United States Code, the Act of Congress of June 25, 1948; and jurisdiction of this Court of this action is provided by Section 1343, Title 28, United States Code, the Act of Congress of June 25, 1948.

IV.

Heretofore, to-wit, on August 28, 1948, there was held in the State of Texas by the Democratic Party a general primary as provided in Article 3137, Revised Civil Statutes of Texas, 1925, for the purpose of making nomination of a candidate for the office of United States Senator from Texas for a term of six years beginning in January, 1949; that in said general primary election which was held on said date in each of the counties of Texas, with the exception of Hansford County and Kinney County, plaintiff Coke R. Stevenson was a candidate for nomination by the Democratic party for United States Senator from Texas for said term; and Lyndon B. Johnson, one of the defendants, was also a candidate for said nomination. Members of the Democratic party residing in Jim Wells County and in Zapata County voted in said primary, and the names of

Coke R. Stevenson and Lyndon B. Johnson appeared on the official primary ballot in said counties as candidates for said nomination.

V.

In Zapata County, Texas, there were on August 28, 1948, four regularly designated and established voting precincts. In precinct No. 1 of Zapata County, Texas, Coke R. Stevenson received 50 votes and Lyndon B. Johnson received 301 votes; in precinct No. 2 of Zapata County, Texas, Coke R. Stevenson received 17 votes and Lyndon B. Johnson received 192 votes; in precinct No. 3 of Zapata County, Texas, Coke R. Stevenson received 59 votes and Lyndon B. Johnson received 91 votes; and in precinct No. 4 of Zapata County, Texas, Coke R. Stevenson received 5 votes and Lyndon B. Johnson received 39 votes. Pursuant to the provisions of Article 3127, Revised Civil Statutes of Texas, 1925, the Chairman of the County Democratic Executive Committee of Zapata County, Texas, certified to the Chairman of the State Democratic Executive Committee the vote in said county as between the two candidates for the nomination of the Democratic party for United States Senator from Texas and fraudulently certified that Lyndon B. Johnson had received 669 votes, when in truth and in fact he had received only 623 votes; and said Chairman further fraudulently certified that Coke R. Stevenson had received only 71 votes in said county in said primary election, when in truth and in fact he had received 131 votes.

VI.

The Democratic primary election officials of Jim Wells County, Texas, after the polls had closed and all of the votes cast in precinct No. 13 of Jim Wells County, Texas, had been counted, first reported that Coke R. Stevenson had received in said precinct No. 13, 60 votes and that Lyndon B. Johnson had received 765 votes. Thereafter, and

approximately five days after the polls had closed and the counting of all votes cast in said precinct No. 13 had been completed and the vote reported, the Democratic primary election officials of Jim Wells County, Texas, fraudulently changed the vote as between Coke R. Stevenson and Lyndon B. Johnson to show that Lyndon B. Johnson had received 967 votes and Coke R. Stevenson had received 61 votes in said election precinct No. 13. At the time the polls were closed and the count of the votes in said election precinct No. 13 had been completed, only 841 votes had been cast in said precinct. In the few days following there were added to the list of persons voting in said precinct 200 additional names and 200 votes which had never been cast were fraudulently credited to Lyndon B. Johnson.

VII.

The former Chairman of the County Democratic Executive Committee of Jim Wells County, Texas, in certifying to the Chairman of the State Democratic Executive Committee the vote in Jim Wells County, Texas, for the Democratic nomination for United States Senator from Texas, fraudulently included in the returns so certified 201 or 202 more votes for Lyndon B. Johnson than he had in truth and in fact received and such additional votes credited to him in said certification were added as above alleged to the vote in precinct No. 13 of Jim Wells County, Texas.

VIII.

Under the provisions of Article 3137, Revised Civil Statutes of Texas, 1925, the State Democratic Executive Committee met on Monday, September 13, 1948, at Fort Worth, Texas, for the purpose of canvassing the returns from the various counties in Texas of the results of said primary election, and of the contest between plaintiff and defendant Lyndon B. Johnson for nomination by the Democratic party for United States Senator from Texas; and said Lyndon B. Johnson was given the benefit of said fraudulent returns

from Zapata and Jim Wells Counties, Texas, and after said canvass was made the State Democratic Executive Committee reported the results to the State Convention of the Democratic party held in Fort Worth on September 14, 1948; and said defendants Chairman and Secretary will issue a certificate of nomination of Lyndon B. Johnson, unless the relief herein prayed for is granted. The number of votes fraudulently credited to Lyndon B. Johnson in the returns from Zapata and Jim Wells Counties, Texas, were sufficient in number to change and did change the results of said primary election in the nomination of a candidate for United States Senator; and if said fraudulent votes so certified from said two counties are deducted from the total vote of the said Lyndon B. Johnson, the plaintiff Coke R. Stevenson would be shown entitled to and he would receive the certificate to nomination.

IX.

Under the laws of Texas, as declared by the Supreme Court of Texas (*Ferguson* v. *Huggins*, 122 Tex. 95, 52 S. W. (2d) 904), the State Democratic Executive Committee's power does not include the power to recount the ballots or go behind the returns filed with it which appear regular upon their face. Under the law of Texas, as declared by the Supreme Court of Texas (*Sterling* v. *Ferguson*, 122 Tex. 122, 53 S. W. (2d) 753), the certificate of nomination issued by the State Democratic Convention will give to Lyndon B. Johnson a standing and a right which will entitle him to have his name printed upon the official general election ballot, unless the certificate is set aside by a proper proceeding such as an election contest. The statutes of Texas make provision for an election contest but the provision so made is ineffective to contest a statewide primary election such as that held on August 28, 1948, because of the limited time between the date provided by statute for the issuance of the certification by the Secretary of State of the State of Texas to the officials of the various counties of the

names to be printed on the official ballot for the ensuing general election; and the effect of the decisions of the Supreme Court of Texas on this question is such as to deprive a candidate in a statewide primary election of any means of effectively contesting such a statewide primary on grounds of fraud or otherwise.

X.

The right asserted by plaintiff to an honest count and an honest certification of the results of said primary election in Zapata and Jim Wells Counties of Texas, and the right to have the returns honestly reported to the State Democratic Executive Committee and its canvass of the returns based upon honest certification from the several counties of the state, are rights secured to plaintiff by the Constitution of the United States and the Acts of Congress cited in the jurisdictional allegations above. Unless this Court by preemptory order restrains the Chairman and Secretary of the State Democratic Convention pending a final hearing in this action, said officers of the State Democratic Convention will make said certification of nomination of Lyndon B. Johnson.

XI.

Plaintiff has diligently investigated and caused to be investigated the matters alleged in this complaint, beginning immediately upon his first learning of possible fraud in said primary election in Zapata and Jim Wells Counties, Texas; that he learned the facts of fraud as herein alleged on September 10, 1948, and upon returning to Austin, Texas, on the morning of September 11, 1948, he arranged to have this petition prepared and filed, but he could not know that the State Democratic Executive Committee would certify the count in favor of Lyndon B. Johnson until it voted to do so late on the night of September 13, 1948. In this connection plaintiff shows that he has been delayed in determining the facts as herein alleged because his demands and the demands of his agents to inspect the records were con-

sistently refused until on September 10, 1948, he was permitted to see the voting list in precinct No. 13 of Jim Wells County, Texas, but was not allowed even then to make a copy thereof.

XII.

The laws of Texas do not afford plaintiff a remedy to enforce his rights and there is no adequate remedy afforded to him by law. Plaintiff's rights can only be protected by restraining orders and injunction as prayed for in this complaint.

WHEREFORE, plaintiff prays that the Court make a peremptory order restraining the defendants Chairman and Secretary of the State Democratic Convention from issuing said certificate of nomination of Lyndon B. Johnson; that the Court make said order returnable and set this action for hearing at the earliest possible date; and that upon trial on the merits of this action, that plaintiff have judgment permanently enjoining the issuance of a certificate of nomination of Lyndon B. Johnson, and, if one has been issued, then cancelling and annulling any certifications so made; for judgment declaring plaintiff received said nomination for United States Senator; for all of which plaintiff demands judgment; and plaintiff prays for such other and further relief as under the facts and in law and in equity he may be justly entitled to receive.

T. R. JAMES,
W. E. ALLEN,
C. C. RENFRO,
DAN MOODY,
Attorneys for Plaintiff.

THE STATE OF TEXAS }
COUNTY OF TARRANT }

Before me, the undersigned authority, on this day personally appeared Coke R. Stevenson, who, being by me first duly sworn, upon his oath deposes and says that he is the plaintiff named in the foregoing complaint; that he had read said complaint and is familiar with the contents thereof and that the allegations of fact set forth in said complaint are true.

/s/ COKE R. STEVENSON.

Subscribed and sworn to before me this 14th day of September, 1940.

/s/ HAZEL CREIGHTON,
Notary Public in and for
Tarrant County, Texas

(Seal)

Sept. 15, 1948 at 6:25 a.m.

This petition being considered, it is ordered that Tom L. Tyson and Vann M. Kennedy be restrained as prayed for pending a hearing hereon on Sept. 21, 1948 at 10 a. m. at Fort Worth, Texas, at which date this temporary order is made returnable.

/s/ T. WHITFIELD DAVIDSON,
U. S. Dist. Judge.

Filed 15 day of September
1948 at 1:00 o'clock p.m.
Geo. W. Parker, Clerk
By Ruth Buckley, Deputy

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil No. 1640.

COKE R. STEVENSON, *Plaintiff*,

v.

TOM L. TYSON, VANN M. KENNEDY, LYNDON B. JOHNSON, PAUL H. BROWN, CLARENCE O. KRAFT, MELVIN FAULK, and SULLY MONTGOMERY, *Defendants*.

AMENDED ORIGINAL COMPLAINT.

To the Honorable Judge of said Court:

Now comes Coke R. Stevenson, who resides in Kimble County, Texas, plaintiff, complaining of Tom L. Tyson, who resides in Navarro County, Texas, Vann M. Kennedy, who resides in Nueces County, Texas, Lyndon B. Johnson, who resides in Blanco County, Texas, Paul H. Brown, who resides in Travis County, Texas, Clarence O. Kraft, Melvin Faulk and Sully Montgomery, all of whom reside in Tarrant County, Texas, and all of whom are hereafter referred to as defendants.

I.

The defendant Tom L. Tyson was elected Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, which is hereinafter referred

to, and Vann M. Kennedy, defendant, was elected Secretary thereof; these defendants are sued individually and in their official capacities as officers of said Democratic State Convention.

The defendant Lyndon B. Johnson was a candidate in the Democratic Primary Election held on August 28, 1948, hereinafter referred to.

The defendant Paul H. Brown is Secretary of State of the State of Texas, and he is sued individually and as such officer.

The defendant Clarence O. Kraft is County Judge of Tarrant County, Texas, and, by virtue of such official position, is a member of the election board for Tarrant County, Texas; the defendant Melvin Faulk is County Clerk of Tarrant County, Texas, and, by virtue of such official position, is a member of the election board for Tarrant County, Texas; the defendant Sully Montgomery is Sheriff of Tarrant County, Texas, and, by virtue of such official position, is a member of the election board for Tarrant County, Texas. These last three are sued individually and in their official capacities in and for Tarrant County, Texas, and as the election board for Tarrant County, Texas.

There are 254 counties in Texas and in each of said counties there is a County Judge, a County Clerk and a Sheriff and in each of said counties said Judge, Clerk and Sheriff constitute the official election board for their respective county.

Said parties constituting the election boards of said counties are so numerous as to make it impractical to bring them all before the Court and, there being a common question of law and fact affecting the several rights and a common relief being sought herein, the said Clarence O. Kraft, Melvin Faulk and Sully Montgomery are sued as representatives of the County Judges, County Clerks and County Sheriffs of Texas and in their capacity as a board as representative of the other 253 election boards of the counties of Texas and the officials constituting such boards.

II.

The occasion for this amendment and the reason for bringing in the above named new parties arise out of the following facts:

Notwithstanding the original restraining order issued by this Honorable Court September 15, 1948, at 6:25 a. m., on or about 11:00 a. m. on said date of September 15, 1948, the defendants Tom L. Tyson and Vann M. Kennedy and Lyndon B. Johnson caused to be presented to the defendant Paul H. Brown, as Secretary of State, in the City of Austin, Texas, a purported certificate of nomination of Lyndon B. Johnson as the Democratic Party's candidate for the office of United States Senator from Texas to the Congress of the United States, and the said Paul H. Brown is threatening to and will, unless restrained by this Honorable Court, certify to or report unto the County Judges, County Clerks, County Sheriffs and the 254 election boards in the counties of Texas, as set out above, that the said Lyndon B. Johnson is the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas to the Congress of the United States, and said election officials, that is, the County Judges, the County Clerks and the County Sheriffs and the election boards constituted by said county officials over Texas, will prepare official ballots for the election to be held November 2, 1948, in which the voters of the State of Texas will elect a Senator from the State of Texas to the Congress of the United States notwithstanding that plaintiff is the legal and only candidate selected by the legal voters in the Democratic primary held August 28, 1948 by the Democratic Party of Texas for the purpose of determining whether the plaintiff or the defendant Lyndon B. Johnson would be selected by the members of the Democratic Party of Texas as the candidate of the Democratic Party of Texas for the office of United States Senator from Texas as aforesaid.

The defendant Paul H. Brown has threatened to make said certification or report to the county election officials

aforesaid immediately and will do so unless restrained by this Honorable Court. If said certification or report is made, said county officials will thereupon prepare official ballots to be used in the general election on November 2, 1948, with the name of the defendant Lyndon B. Johnson printed thereon as the candidate of the Democratic Party of Texas for the office of United States Senator as aforesaid, and will distribute said ballots to the various precincts in their respective counties and make same available to the voters in the general election to be held November 2, 1948, unless restrained by this Honorable Court.

That, if said certification or report is made by the defendant Paul H. Brown to said election boards and said ballots are printed with the name of Lyndon B. Johnson thereon, as set out above, irreparable injury and damage will result to plaintiff before notice can be served and a hearing had thereon.

III.

The Democratic Party of Texas is a political party as defined by statutory laws of Texas and for many years has exercised its right to designate candidates for offices to be elected by the voters of Texas and in all the years in which a United States Senator from the State of Texas to the Congress of the United States was to be elected it has always designated a candidate thereof, and the primary election held by the Democratic Party of Texas August 28, 1948, referred to in the original complaint and in this amended original complaint, was a part of the process of nominating a candidate for said office which the Democratic Party of Texas must follow in order to have its candidate's name placed on the official ballot to be used in the general election on November 2, 1948.

Plaintiff is now and has been for a number of years a member of the Democratic Party of Texas and was a candidate at the first or original primary election held July 24, 1948, by the Democratic Party of Texas and together

with the defendant Lyndon B. Johnson was elected to be a candidate in the run-off election held August 28, 1948, for final election by the members of the Democratic Party as the candidate of the Democratic Party for the office of United States Senator as aforesaid.

IV.

As a part of this amendment, plaintiff adopts and makes a part hereof as fully as if written herein all allegations contained in the original complaint filed in this cause of September 15, 1948, and the facts therein alleged still exist.

WHEREFORE, plaintiff prays that the Court enlarge the restraining order heretofore made on September 15, 1948, herein, restraining the defendants Tom L. Tyson and Vann M. Kennedy, as Chairman and Secretary of the State Democratic Convention from issuing said certificate of nomination of Lyndon B. Johnson; and that the defendant Paul H. Brown be restrained from certifying or reporting to the County Judges, County Clerks, County Sheriffs and County election boards of the State of Texas the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas; that the defendants Clarence O. Kraft, Melvin Faulk and Sully Montgomery in all of their official capacities, and all other County Judges, County Clerks, County Sheriffs and County election boards of the respective counties of Texas be restrained from preparing and distributing any official ballots for use in the general election to be held November 2, 1948, which contain the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas; that the court make said order returnable and set this action for hearing September 21, 1948, at 10:00 a. m. as originally ordered; and, that upon trial on the merits of this action that plaintiff have judgment permanently enjoining the issuance of a certificate of nomina-

tion of Lyndon B. Johnson, and, if one has been issued, then cancelling and annulling any such certification so made; and that the defendant Paul H. Brown and all other defendants herein named as election officials be permanently enjoined from preparing any official ballot for use in the general election November 2, 1948, carrying the name of the defendant Lyndon B. Johnson as the nominee of the Democratic Party of Texas for the office of United States Senator from the State of Texas; for judgment declaring plaintiff received the nomination of the Democratic Party of Texas for United States Senator; for all of which plaintiff demands judgment; and plaintiff prays for such other and further relief as under the facts and in law and in equity he may be justly entitled to receive.

T. R. JAMES,
DAN MOODY,
ALLEN B. CONNER,
JOSH H. GROCE,
(H. O. RENFROE),
Attorneys for Plaintiff.

Filed 17 day of September 1948 at 9:55 o'clock a. m.

THE STATE OF TEXAS
County of Tarrant

BEFORE ME, the undersigned authority, on this day personally appeared Coke R. Stevenson, who, being by me first duly sworn, upon his oath deposes and says that he is the plaintiff named in the foregoing Amended Complaint; that he had read said Amended Complaint, and is familiar with the contents thereof and that the allegations of fact set forth in said Amended Complaint are true.

/s/ COKE R. STEVENSON.

Subscribed and sworn to before me this 16th day of September, 1948.

.....
Notary Public, Tarrant County, Texas.

EXHIBIT B1.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil No. 1640.

COKE R. STEVENSON, *Plaintiff*,

v.

TOM L. TYSON, ET AL., *Defendants*.

ENLARGED RESTRAINING ORDER.

The Amended Original Complaint of Plaintiff having been presented and considered wherein the Plaintiff has brought in additional parties and is seeking an enlargement of the Original Restraining Order issued herein, and

IT APPEARING TO THE COURT that the relief should be granted, and

IT FURTHER APPEARING TO THE COURT that irreparable injury and damage will result to Plaintiff before notice can be served and a hearing had thereon because the Defendant Paul H. Brown is threatening to certify and report the nomination of the Defendant Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas to the Congress of the United States, and that upon receipt of such certification, and report of nomination the Defendants County Judges, County Clerks, County Sheriffs and County Election Boards in the 254 counties of Texas will prepare

and distribute official ballots to be used in the November 2, 1948, general election carrying the name of Defendant Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator unless a restraining order is issued immediately;

It Is Therefore Ordered that the Original Restraining Order be continued in full force and effect until the date set for its hearing, namely, September 21, 1948, at 10:00 A. M., and thereafter until said hearing is concluded, and that such restraining order be enlarged and the same is hereby enlarged to restrain the Defendant, Paul H. Brown from certifying or reporting to the Defendants Clarence O. Kraft, Melvin Faulk and Sully Montgomery, individually and as County Judge, County Clerk, County Sheriff of Tarrant County, and in their capacity as members of the Election Board for Tarrant County, Texas, and the other County Judges, County Clerks and County Sheriffs and County Election Boards in each of the Counties of Texas, that Lyndon B. Johnson is the candidate of the Democratic Party of Texas for the office of United States Senator for the State of Texas to the Congress of the United States; and the Defendants Clarence O. Kraft, Melvin Faulk, Sully Montgomery in their respective official capacity and as members of the Election Boards for Tarrant County, and all other County Judges, County Clerks, and County Sheriffs in their respective official capacity and as members of their respective County Election Boards are hereby restrained from preparing and distributing official ballots for use in the general election to be held November 2, 1948, carrying the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas to the Congress of the United States; the original restraining order as herein enlarged, and this restraining order shall remain in effect until September 21, 1948, at 10:00 A. M., at which time they are made returnable and shall then remain in force until the conclusion of the hearing thereon, which hearing shall

be held in the United States District Courtroom in the City of Fort Worth, Texas.

IT IS FURTHER ORDERED AND ADJUDGED that this Order shall become effective and operative upon the filing by the Plaintiff of the Statutory Undertaking in the sum of $1,000, to be approved by the Clerk of the Court.

SIGNED this 16th day of September, 1948, 8:35 P. M.

/s/ T. WHITFIELD DAVIDSON
United States District Judge

EXHIBIT C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil No. 1640

COKE R. STEVENSON, *Plaintiff*,

v.

TOM L. TYSON, VANN M. KENNEDY, LYNDON B. JOHNSON, PAUL H. BROWN, CLARENCE O. KRAFT, MELVIN FAULK, AND SULLY MONTGOMERY, *Defendants*.

DEFENDANT LYNDON B. JOHNSON'S MOTION TO DISMISS FOR WANT OF JURISDICTION.

To the Honorable Judge of Said Court:

Defendant, Lyndon B. Johnson, although no notice has been given to him to appear in connection with the show cause orders issued by this Honorable Court on September 15th and 16th, since he is the real party at interest and the other Defendants have no personal interest in the outcome of this hearing, appearing for the sole purpose of filing this motion only, moves the Court to dismiss action for the following reasons:

(1) Because the Complaint, as amended, wholly fails to state sufficient facts to show that this Court has jurisdiction of the person of this Defendant or the cause of action which is the subject matter of this suit;

(2) Because the Complaint, as amended, shows on its face that this Court is wholly without jurisdiction of the person of this Defendant or the cause of action which is the subject matter of this suit;

(3) Because the Complaint fails to state a cause of action upon which relief can be granted;

(4) Because, as shown on the face of the Complaint and the Amended Complaint herein, this Court does not have venue of this motion since the only cause of action attempted to be asserted herein is against Defendant Paul H. Brown, Secretary of State, and this Defendant, neither of whom is a resident of this district or division;

(5) Because the Complaint, as amended, on its face affirmatively shows that the ultimate relief sought by Plaintiff herein is a judgment against this Defendant, which judgment can be obtained only as a result of a contest of the Primary Election held by the Democratic Party of Texas in its Second Primary conducted on the 28th day of August, 1948; all the allegations in the Complaint and the Prayer for relief are in essence and character an election contest, and present no other cause of action; and this Court has no jurisdiction to try, hear or determine an election contest;

(6) Because the Complaint and Amended Complaint on their face show that this is a suit between Plaintiff and this Defendant involving the title and right to the Democratic nomination as a candidate for United States Senator of and from the State of Texas, over which this Court has no jurisdiction;

(7) Because it appears from the allegations of the Complaint and Amended Complaint that the relief sought in this suit is not based upon a civil action authorized by law, but is in the nature of an election contest and suit for an office and an attack upon the verity of legal and duly exe-

cuted certification from the legally authorized agencies and officers of the State of Texas, which this Court has no jurisdiction to entertain;

(8) Because the Complaint, in substance and effect, presents a civil action for supposed rights to and possession of the office of United States Senator, the same being an action involving an election dispute of which no jurisdiction is given to this Honorable Court by any law, but of which the United States District Courts are *denied* jurisdiction by the plain terms of Title 28, United States Code, Section 1344;

(9) Because the Prayer of the Complaint asking that the certificate of Lyndon B. Johnson as nominee of the Democratic Party for United States Senator be cancelled and that Complainant be declared the nominee instead is, in effect, an application for a Writ of Mandamus against the Secretary of State and the various County officers, constituting the County Election Boards, to compel them to print Complainant's name on the ballot, and this Court has no power to grant Writs of Mandamus or any other relief in election cases;

(10) Because the Complaint fails to allege against any Defendant therein any fact or facts tending to show any purposeful or intentional discrimination between persons or classes of persons; therefore, said Complaint wholly fails to state any cause of action of which this Court has jurisdiction;

(11) Because the Complaint fails to allege against any Defendant therein any fact or facts tending to show any conspiracy or other unlawful acting together to discriminate as between persons or classes of persons; therefore said Complaint wholly fails to state any cause of action of which this Court has jurisdiction;

(12) Because the Complaint shows upon its face that the persons who Complainant alleges have wronged him by

the alleged fraudulent certifications in Zapata County, Texas and Jim Wells County, Texas: namely, the Chairmen of the County Democratic Executive Committees for said Counties, are not parties Defendant to this suit; and any relief to which Complainant might be entitled in an appropriate action would be against such parties and not against Defendants herein;

(13) Because the Complainant alleges no injury to himself under the Federal Constitution or any Federal law, but purports to allege injury under the election laws and procedures of the State of Texas, and the jurisdiction of this Court is strictly limited to that provided by Federal law;

(14) Because any rights that might be asserted in this Court with respect to the matters embraced by this Complaint can be asserted only by the Government of the United States in criminal proceedings or by a person who has been deprived of rights, privileges or immunities secured by the Constitution and laws thereunder, and the Complaint makes no allegations of any such rights, privileges or immunities of which Complainant has been deprived;

(15) Because the Complaint does not allege that Complainant is or was a voter or resident in Zapata or Jim Wells County, but seeks to invoke the jurisdiction of this Court to vindicate an alleged right of Complainant to a place on the ballot as the Democratic nominee for United States Senator, which place on the ballot arises and can be secured only under and pursuant to the laws of the State of Texas over which this Court has no jurisdiction;

(16) Because even if this Court had jurisdiction to enjoin a certification duly made under the laws of Texas of a candidate pursuant to the Primary Election held under such laws, it could not do so unless and until Complainant had pursued and exhausted his remedies under the laws of Texas;

(17) Because even if the Complainant had been deprived of any rights, privileges or immunities within the meaning of Title 8, Section 43, United States Code, such deprivation consisted in the alleged wrongful certification of ballots in Zapata and Jim Wells Counties which are set forth in the Complaint, and which certifications are final and complete under the laws of the State of Texas, thereby making the controversy which Complainant seeks to present to this Court entirely moot;

(18) Because this action is moot for the reason that as hereinafter alleged (paragraph 22) the final action has been duly and lawfully taken by the duly constituted agencies and officials of the State of Texas and the Democratic Party of the State of Texas and all that remains to be done is the ministerial act of certification by the Secretary of State which he is obliged by the laws of the State of Texas to perform, thereby making this controversy moot;

(19) Because, if everything alleged by Complainant were true (which this Defendant does not admit but will deny under oath in the proper forum), the Complainant's remedy is exclusively under the laws and in the courts of the State of Texas;

(20) Because the claim which Plaintiff presents to this Court is a claim which does not involve property or civil rights, but political rights, and over which a Federal Court of equity has no jurisdiction under Title 8, Section 43, United States Code, but which arises under and involves solely the laws of the State of Texas;

(21) Because, in so far as any relief sought herein against Defendant Paul H. Brown, Secretary of State, and the Defendants constituting the official election boards of Tarrant County and the other counties of Texas is concerned, the cause of action constitutes a suit against the State of Texas;

(22) Because this Court may not exercise its equitable jurisdiction in this situation for the reasons that (a) the rights of this Defendant in and to certification and inclusion upon the ballot as the nominee of the Democratic Party have incontestably vested under the laws of the State of Texas, and are not subject to the processes of this Court; and (b) this Court cannot grant to Complainant the remedy which he seeks: Namely, to usurp the position of this Defendant as said nominee, because the selection of said nominee is and can be made only under and pursuant to the election laws of the State of Texas; all of which more particularly appears from the following:

This Defendant, being a citizen of the State of Texas and in every way qualified and in no way disqualified to hold the office of United States Senator of and from the State of Texas, was a candidate for the nominee of the Democratic Party of Texas for said office at the Second Primary of the Democratic Party of Texas conducted and held on August 28, 1948, and the State Executive Committee of the Democratic Party of Texas, pursuant to and acting within the duties and powers conferred upon it by law, duly, regularly, and legally canvassed the returns of said election as said returns were certified to it by the Chairmen of the Executive Committees of the several counties of Texas in which such election was held; and at such canvass Plaintiff herein appeared before said Committee and challenged and questioned the returns as certified by the County Chairman of Jim Wells County, making the same allegations of fraud as contained in the Complaint herein filed, but accepted as correct and made no challenge respecting the returns from Zapata County or any other County in Texas; that after a full hearing and as a result of its canvass of the returns certified to it in accordance with law, the said State Executive Committee determined that this Defendant had received a majority of the votes cast for United States Senator in said Primary Election and so certified the result thereof to the Chairman of the State Demo-

cratic Convention. Based on the returns so certified by the State Executive Committee, the State Democratic Convention, duly held, organized and convened in the City of Fort Worth, Texas, and the officers and members thereof, did, on the 14th day of September, 1948, duly and regularly declare this Defendant to be the nominee of the Democratic Party and to be its candidate for the office of United States Senator of and from the State of Texas at the next ensuing General Election to be held in the State of Texas on the first Tuesday in November, 1948. Pursuant to the declaration so made, and in obedience to the requirements of law, the Chairman of said Convention, Honorable Tom L. Tyson, and the Secretary thereof, Honorable Vann M. Kennedy, Defendants herein, did, on said 14th day of September, 1948, and prior to the filing of this suit, prior to the presentation of the Complaint herein to your Honor, and prior to the entry of any Order herein, duly and legally certify to the Secretary of State of the State of Texas, Honorable Paul H. Brown, one of the Defendants herein, the name of this Defendant as the candidate of the Democratic Party of and from the State of Texas at such General Election, all in accordance with the provisions of valid statutes of the State of Texas. A true and correct copy of such certification is attached hereto and made a part hereof for all purposes. Said certificate was duly received by the Defendant Paul H. Brown, in his official capacity as Secretary of State of the State of Texas, on September 15, 1948, and is now on file at the office of said Defendant. By virtue of the facts aforesaid, this Defendant is entitled to have the Defendant Paul H. Brown, in his capacity as Secretary of State of the State of Texas, certify to each of the County Clerks of the several counties of the State of Texas the name of this Defendant as nominee of the Democratic Party of Texas and as its candidate for the office of United States Senator of and from said State of Texas in the General Election to be held in said State on November 2, 1948, and to have the name of this Defendant, as such

nominee and candidate, to be duly and seasonably printed upon the official ballots to be used in said General Election in the several counties of the State of Texas. The Defendant Paul H. Brown, as Secretary of State, in his official capacity is required by law to perform the ministerial duty of certifying the name of this Defendant as the nominee and candidate of the Democratic Party of Texas for the office of United States Senator of and from the State of Texas to the several County Clerks of the State of Texas, and the Defendants Clarence O. Kraft, Melvin Faulk and Sully Montgomery, as the official election board of Tarrant County, and the official election boards of the other counties of Texas are required by law to perform the ministerial duty of placing the name of this Defendant, as the nominee and candidate of the Democratic Party of Texas for the office of United States Senator of and from the State of Texas on the official ballot to be voted in the General Election to be held in Texas on the first Tuesday in November, 1948. By virtue of such facts, this Defendant has a vested legal right to have the Secretary of State certify his name as such nominee and candidate to the County Clerks of the several counties of Texas, and to have the election boards of said counties perform all ministerial duties imposed on them and requisite to having the name of this Defendant appear as such nominee and candidate for said office on the official ballot to be used and voted at said General Election in the several counties of Texas. As alleged by Plaintiff under oath in the original Complaint, "under the law of Texas as declared by the Supreme Court of Texas (*Sterling* v. *Ferguson*, 122 Tex. 122, 53 S. W. (2) 133), the certificate of nomination issued by the State Democratic Convention" would "give to Lyndon B. Johnson a standing and a right which" entitles "him to have his name printed upon the official General Election ballot, unless the certificate is set aside by a proper proceeding such as an election contest."

WHEREFORE, this Defendant prays this Honorable Court to immediately grant his above and foregoing Motion to Dismiss, this Defendant hereby expressly reserving all rights and privileges of answering on the merits of any cause of action or justiciable issue of which this Court may hold it has jurisdiction.

LYNDON B. JOHNSON, *Defendant.*

The State of Texas, County of Tarrant:

BEFORE ME, the undersigned authority, on this day personally appeared LYNDON B. JOHNSON, known to me to be the person whose name is subscribed to the foregoing pleading, who being by me duly sworn, states upon oath: I have read the foregoing motion and the facts therein stated are true.

(s) LYNDON B. JOHNSON.

SWORN to and subscribed before me, this....day of September, A.D., 1948.

.....
Notary Public in and for Tarrant County, Texas.

EXHIBIT D.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil No. 1640.

COKE R. STEVENSON, *Plaintiff*,

v.

TOM L. TYSON, VANN M. KENNEDY, LYNDON B. JOHNSON, PAUL H. BROWN, CLARENCE O. KRAFT, MELVIN FAULK, and SULLY MONTGOMERY, *Defendants*.

ORDER GRANTING TEMPORARY INJUNCTION.

On the 21st day of September, 1948, came on before the Court the hearing on the application for temporary injunction filed herein by Plaintiff, Coke R. Stevenson, against Defendants, Tom L. Tyson, Vann M. Kennedy, Lyndon B. Johnson, Paul H. Brown, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery; the hearing on such application for temporary injunction having been fixed by an order of this court, entered on September 15, 1948, and enlarged on September 16, 1948, wherein temporary restraining orders were issued pending the hearings fixed for this day.

And came the Plaintiff in person and by his attorneys of record; and came the Defendants, Tom L. Tyson, Vann M. Kennedy, and Paul H. Brown, by their attorneys of record; and also came the defendant, Lyndon B. Johnson, in person and by his attorneys of record.

The Defendants, Clarence O. Kraft, County Judge of Tarrant County, Texas, Melvin Faulk, County Clerk of

Tarrant Couty, Texas and Sully Montgomery, Sheriff of Tarrant Couty, Texas, composing the Election Board of Tarrant Couty, Texas, came not. Came also the intervenors, V. E Striegler, County Judge of Blanco County, Texas, Fran Shelley, Sheriff of Blanco County, Texas, and C. H. Stcenson, County Clerk of Blanco County Texas, composing th election board of Blanco County, Texas, as representativ of the other 253 Election Boards of the counties of Txas and the officials constituting such boards, by their attcneys, they having been permitted to intervene herein b order of this Court.

All of the foresaid parties, both Plaintiffs, Defendants, and Intervenors, having appeared in response to such show cause orders of September 15, 1948, and September 16, 1948, for the urpose of responding thereto.

And the Dfendant, Lyndon B. Johnson, and the Intervenors name above first appeared specially for the limited purpose of presenting the motions to dismiss filed by the Defendan, Lyndon B. Johnson, and the above named Intervenors, wherein such parties denied that this Court had jurisdicton over this case for the reasons set out in each such moion to dismiss.

And the Court, having first heard and considered the motions to dismiss aforesaid, has heretofore overruled such motions, to which each of the parties urging the same excepted and here and now again except. And thereupon, on the 22nd day of September, 1948, the Defendant, Lyndon B. Johnson, and the Intervenors above named requested leave to withdraw the written opposition to the granting of the temporary injunction theretofore filed herein on September 21, 1948, and further in connection therewith requested the Court to render judgment on the Plaintiff's application for temporary injunction based on his sworn petition. The Court thereupon called upon the Plaintiff to state his position with respect to such request on the part of the Defendant, Lyndon B. Johnson, and the Intervenors above named, and was advised by the Plaintiff that he, the Plain-

tiff, desired to offer evidence in support of his application for temporary injunction. The Court thereupon ruled that the requests made by Defendant Lyndon B. Johnson and the Intervenors above named would be denied and that he would proceed to hear evidence on such application for temporary injunction.

Thereupon the Court heard the evidence from the witnesses and received in evidence affidavits and other documentary evidence, at the conclusion of which the Court invited and heard arguments from Counsel for the Plaintiff, Counsel for the Defendant, Lyndon B. Johnson, and Counsel for the above named Intervenors. After hearing such arguments the Court thereupon, on the 22nd day of September, 1948, found the facts to be with the Plaintiff and announced his Judgment granting the temporary injunction restraining the Defendant, as hereinafter set out, for the reason that there was evidence of fraud in the official returns from certain election officials in Jim Wells, Zapata, and possibly other counties to the State Democratic Executive Committee, without which there would have been a change in the official certification by the Officers of the State Convention as to who was the Democratic nominee for the Office of United States Senator and that an injunction is necessary to preserve the subject matter of the litigation pending trial on the merits and to prevent the deprivation of rights guaranteed by the Constitution and Laws of the United States.

Thereupon in open Court on the 22nd day of September, 1948, the Defendant, Lyndon B. Johnson, and the above named Intervenors each requested the Court to stay the temporary injunction pending an appeal from such temporary injunction to the Circuit Court of Appeals of the United States for the Fifth Circuit sitting at New Orleans, to which Court said Defendant, Lyndon B. Johnson, and said intervenors are appealing.

The Court denied the requests aforesaid for a stay, to which the Defendant, Lyndon B. Johnson, and the above named Intervenors each excepted.

It is therefore, on the 22nd day of September, 1948, ordered and adjudged and decreed by the Court that the Defendants and Intervenors, and each of them, are temporarily enjoined and restrained from certifying or reporting to the Defendants, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery, individually and as County Judge, County Clerk, and County Sheriff of Tarrant County, Texas, and in their capacities as members of the Election Board of Tarrant County, Texas, and the other County Judges, County Clerks, and County Sheriffs, and County Election Boards in each of the counties of Texas, that Lyndon B. Johnson is the candidate of the Democratic Party of Texas for the Office of United States Senator of the State of Texas to the Congress of the United States; and further enjoining and restraining the Defendants, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery, in their respective official capacities and as members of the Election Board for Tarrant County, Texas, and all other County Judges, County Clerks, and County Sheriffs, including the Intervenors above named in their respective official capacities and as members of their respective County Election Boards from preparing and distributing official ballots for use in the General Election to be held November 2, 1948, carrying the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the Office of United States Senator from the State of Texas to the Congress of the United States.

It is further ordered and adjudged that this temporary injunction shall remain in full force and effect pending the determination of this action; provided that the Plaintiff first gives security in the sum of $1,000. for the payment of such costs and damages as may be incurred and suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the Court.

And it is further ordered that the Defendants and Intervenors, or such of them as desire, are given leave to appeal this order.

Entered as of the 22nd day of September, 1948, and executed this the 23rd day of September, 1948.

/s/ T. Whitfield Davidson,
United States District Judge.

Approved as to Form:

/s/ Dan Moody,
Attorney for Plaintiff.

/s/ James V. Allred,
Attorney for Defendant, Lyndon B. Johnson.

/s/ Everett L. Looney,
Attorneys for Intervenors.

EXHIBIT E.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12,529

LYNDON B. JOHNSON, ET AL, *Appellants,*

VS.

COKE R. STEVENSON, *Appellee.*

On Appeal from the District Court of the United States for the Northern District of Texas.

On Motion for Stay of Temporary Injunction Granted by the District Judge.

Before JOSEPH C. HUTCHESON, JR., Circuit Judge:

Appellants having lodged their appeal with the court, by motion, addressed to it but presented to me individually in chambers in Houston, Texas, seek an order from the court "setting aside and staying the temporary injunction order issued by the court below pending the determination of this appeal".

On grounds strongly alleged and as strongly presented, they urge that the suit below was in substance and effect an election contest and as such was a matter over which the court had no jurisdiction. They allege and urge that in assuming jurisdiction thereof and entering the order complained of, the court acted unlawfully and without authority, and that unless the temporary injunction order is stayed

and set aside by the court pending determination of the appeal, the voters of Texas will be prevented from voting for the lawful candidate of the Democratic party for the office of United States Senator. They allege and urge that the granting of the stay will not nullify nor impair any rights of Stevenson, and finally that unless the stay is issued by the court, the court will be deprived of its appellate jurisdiction since the matter will have become moot by the time that it can pass upon the appeal.

The counsel for the appellee, Stevenson, having been notified that the application would be presented, were present, full arguments from both sides were heard, both upon the merits of the contention that the court below is without jurisdiction and on the question of relief which the hearing judge could, and ought to, grant.

In the course of the arguments, the power and function of a single circuit judge to grant relief of the kind sought as distinguished from the power of the court itself was fully presented and discussed.

Thereupon, the counsel for both sides having expressed their desire for as early a hearing as possible by the court, it was determined that the appeal, together with any other matters connected with this proceeding or the case from which it comes, which either party desired to present, would be set before the court at its October term in Atlanta on Monday, October 4th, and the clerk was directed to set the case accordingly. This having been done, and the arguments having been concluded, and the matter having been further investigated, I have reached the firm conclusion that whatever the merits of the controversy may be or may be determined to be, and whatever the court may determine it could, or should, do in respect to the motion for stay or any other relief which may be asked of it, it is quite clear that I, as a single circuit judge, have no power, and ought not, to set aside or stay the injunction appealed from, and that if I should consider the motion as addressed to me individually, I would have no power, and ought not, as a single judge, to grant it.

Petitioners' reliance upon Rule 62(g) of the Rules of Civil Procedure, as conferring power on me to act, will not do. That subdivision of the rule does not purport to, it does not, confer power. It merely provided that the other provisions of rule 62 do not limit any power which may presently exist under the law. A careful examination of the law reveals no statute authorizing one appellate judge to set aside or stay the injunction of a district judge, especially since, as rule 62(c) makes plain, the power to determine whether an injunction should be suspended, etc. is conferred on the district judge.

The Court of Appeals does have power under 28 U.S.C.A. Sec. 377, to issue any writ, including a stay "strictly in aid of the appellate jurisdiction", *In Re: Phila.* v. *Redding,* 103 F(2) 901. In *Scripps-Howard Radio* v. *Com.,* 316 U.S. 4, it is held that a court of appeals has power to stay an order of the commission under the general power of the court to protect from irreparable wrong.

I have no doubt then, of the power of the court to grant a stay in connection with the appeal if it appears to the court that this will preserve the status quo or the effectiveness of the judgment subsequently to be rendered, and I am also of the opinion that the court can, by writ of prohibition issued under the restrictive rules governing such writs, grant relief from the exercise of jurisdiction by a district court which is clearly beyond its power. I find no statute and no precedent which will support the action of a circuit judge in undertaking to suspend an injunction pending the appeal. Title 28 U.S.C.A., Sec. 227 contains a provision which might be thought applicable. This section providing for appeals of interlocutory orders provides: "and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof". This plainly has to do with not the temporary injunction appealed from but "the proceedings in other respects".

In one poorly considered case, *Sommer* v. *Rotary Lift Co.,* 58 F(2) 765, the Circuit Court for the Ninth Circuit

did hold that a single circuit judge could grant a supersedeas in an appeal from an interlocutory injunction in a patent case. It said, however, "Ordinarily application for supersedeas after denial thereof by trial judge should not be granted by circuit judge", and the authorities that it cites in support of its holding that the power existed, 28 U.S.C.A., Sec. 227 and *Haverman Mfg. Co.*, 147 U. S., 525, do not support it.

I have noted on the motion "Denied by me without prejudice to the right to present the motion to the court", and have instructed the Clerk of the Court to file the motion with such notation.

JOSEPH C. HUTCHESON, JR.,
Circuit Judge.

Sept. 24, 1948.

EXHIBIT F.

STATE OF TEXAS }
COUNTY OF TRAVIS }

BEFORE ME, the undersigned authority, on this day personally appeared Paul H. Brown, known to me, who being first duly sworn upon oath says:

I am Secretary of State of the State of Texas.

Art. 2925 Revised Civil Statutes of Texas provides that "at least thirty days before each general election the Secretary of State shall prescribe forms of all blanks necessary under this title and furnish same to each County Judge."

This means that I should have in the hands of each of the 254 County Judges of the State of Texas a sample ballot to contain the names of the nominees for each party not later than October 2. As a practical matter, in view of the fact that the means of communication with many of the 254 counties is limited to railroad or bus line, I must send out these blanks several days in advance of October 2. As a further practical matter, before sending out such blanks I must have the proof prepared by the printer, proofread the same and the printing completed in advance of the time before the same are placed in the mails for transmission to the 254 County Judges of Texas.

As a further practical matter, due to previous experience of this office, it is my considered opinion that I must place these blanks in the mails directed to the 254 County Judges in Texas commencing September 27th, 1948, in order that they may reach the various County Judges in sufficient time for the County Judges to comply with Art. 2950 Revised Civil Statutes of Texas, and the County Clerks to comply with Penal Code, Art. 206.

I will on about September 27th, 1948 mail out certificates and blanks to the various County Judges of Texas without the name of Lyndon B. Johnson or anyone's name as the Democratic candidate for United States Senator. If I am later relieved from the compulsion of the Restraining

Order issued by Honorable T. Whitfield Davidson, Judge of the United States District Court of the Northern District of Texas, and later certify to the various County Judges the name of Lyndon B. Johnson as the Democratic nominee for United States Senator, it may be impossible for many of them, because of difficulties of communications, to post the notice with the name thereon for the ten (10) days prescribed by law. The matter of having the candidate's name printed on the official ballot to be used in the General Election as candidate for such office presents a practical problem. The ballots for use of absentee voting must be ready because absentee voting begins twenty (20) days prior to the date of the General Election.

Further Affiant saith not.

PAUL H. BROWN.

SWORN TO AND SUBSCRIBED before me by the said Paul H. Brown this 25th day of September, 1948.

H. W. DUNLOP,
Notary Public,
Travis County, Texas.

(SEAL.)

EXHIBIT G.*

STATE OF TEXAS }
COUNTY OF TRAVIS }

BEFORE ME, the undersigned authority, on this day personally appeared Miss Emilie Limberg, known to me, who being first duly sworn upon oath says:

I am County Clerk of Travis County, Texas.

It is my duty to post in a conspicuous place in my office at the Court House for the inspection of the public the names of all candidates that have been lawfully certified to me by the Secretary of State to be printed on the official ballot for at least ten days before I order the same to be printed on said ballot. My failure to do the foregoing subjects me to a fine of not less than $200.00 nor more than $500.00. Texas Penal Code, Art. 206.

I must be prepared to permit absentee voting to commence on October 13, 1948, for the general election to be held on November 2, 1948. R. C. S. Art. 2956.

Further affiant saith not.

EMILIE LIMBERG.

SWORN TO AND SUBSCRIBED before me by the said Emilie Limberg this 25th day of September, 1948.

H. W. DUNLOP,
Notary Public,
Travis County, Texas.

(SEAL)

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* Note: Only the affidavit of Limberg is printed herein since the affidavits of John S. Simmang, John J. Burttschell, Frank Shelley, C. H. Stevenson, O. E. Striegler, Ford Albritton, Arthur Tipp and Hammett Vance, are to the same effect.

ANNEX "B."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION.

Civil Action No. 1640.

COKE R. STEVENSON, *Plaintiff*,

v.

TOM. L. TYSON, ET AL., *Defendants*.

ORDER APPOINTING SPECIAL MASTERS.

It appearing to the Court that the trial of this case will involve consideration of much evidence from sources outside the territorial limits of this judicial district and that testimony from many witnesses residing outside this district will be needed in the trial of this case and that this is the kind of a case where a preliminary report by experienced masters will be of substantial service;

IT IS THEREFORE ORDERED that W. R. Smith Jr. be and he is appointed hereby Special Master to make an investigation as to the facts with respect to the Democratic Party primary election held in Jim Wells County, Texas, August 28, 1948, in so far as it affected the nomination by the Democratic party of Texas of a candidate for the Office of United States Senator from Texas as between Coke R. Stevenson and defendant Lyndon B. Johnson. Said Special Master shall go to Jim Wells County and hold such hearings as may be necessary for a full investigation of the facts as to the conduct and results of said Primary Election in Jim Wells County, Texas, and hear witnesses, examine the certified poll lists, the lists of those who voted in said election, the tally lists and return sheets made in the conduct of said election, and particularly all the facts in respect to the holding of said election and the returns therefrom in Precinct Thirteen (13) of Jim Wells County, Texas.

At such hearings the parties may be represented by counsel and at their request said Special Master shall issue process to compel the attendance of witnesses and the production of evidence for use at such hearings or in the trial of this case. If requested, the Master shall make copies of any pertinent evidence and impound the originals for use in this Court upon the trial of this case.

Also It is Ordered That J. M. Burnett be and he is hereby appointed Special Master to make an investigation as to the facts with respect to the Democratic Party primary election held in Duval and Zapata Counties, Texas, August 28, 1948, in so far as it affected the nomination by the Democratic Party of Texas of a candidate for United States Senator from Texas as between Coke R. Stevenson and defendant Lyndon B. Johnson. Said Special Master shall go to Duval and Zapata Counties and hold such hearings as may be necessary for a full investigation of the facts as to the conduct and results of said primary election in Duval and Zapata Counties, Texas, and hear witnesses, examine the certified poll lists, the lists of those who voted in said election, the tally sheets and return sheets made in the conduct of said election, and particularly all the facts in respect to the holding of said election and the returns therefrom in Precincts One (1), Two (2), Three (3), and Four (4) of Zapata County, Texas, and in Duval County, Texas.

At such hearings the parties may be represented by counsel and at their request said Special Master shall issue process to compel the attendance of witnesses and the production of evidence for use at such hearings or in the trial of this case. If requested, the Master shall make copies of any pertinent evidence and impound the originals for use in this Court upon the trial of this case.

Each of said Special Masters may appoint a reporter to take and transcribe any oral testimony offered by either party.

Said Special Masters are appointed in accordance with Rule 53, Federal Rules of Civil Procedure, and the pro-

ceedings, shall be governed thereby, unless otherwise provided herein. Each Special Master shall set forth in his report his findings of fact and conclusions of law as to the issues submitted. Each report shall have the effect set forth in subdivision (3) of said Rule. Unless otherwise ordered, each report shall be filed herein on or before October 2nd, 1948.

/s/ T. WHITFIELD DAVIDSON,
United States District Judge.